TRANSCRIPT OF RECORD

1 732

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1557.

F. C. HOWES, PLAINTIFF IN ERROR,

vs.

LEVI M. KELLOGG, THE WILLAMETTE STEAM MILLS, LUMBERING AND MANUFACTURING COMPANY; CHARLES J. MAITRE AND HENRY C. HANSEN, COPARTNERS UNDER THE FIRM NAME OF MAITRE & HANSEN; E. L. TOWER, THE CALIFORNIA DOOR COMPANY, B. A. BREAKEY, AND A. H. PARSONS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 10, 1890.

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1 & 2 In the Supreme Court of the State of California.

From the superior court of Los Angeles county.

LEVI M. KELLOGG *et al.*, Respondents,
vs.
F. C. HOWES *et al.*, Appellants. } No. 13324.

Transcript on Appeal.

Hayn[illegible]s & Mitchell, attorneys for appellants.

Filed June 26th, 1889.

J. D. SPENCER, *Clerk*,
By B. C. WEIR, *Deputy Clerk*.

3 In the Superior Court in and for the County of Los Angeles, State of California.

LEVI M. KELLOGG, Plaintiff,
vs.
F. C. HOWES and F. W. DEARBORN, Assignee of W. E. Lane, an Insolvent, and W. E. Lane, Defendants. } Complaint.

I.

Plaintiff above named complains of the defendants above named, and for cause of action alleges—

4 That the defendant, F. C. Howes, is and at all the times hereinafter mentioned was the reputed owner and was also the owner and seized in fee of all that certain lot, piece, or parcel of land situated in the city of Los Angeles, in the county of Los Angeles and State of California, and bounded and more particularly described as follows:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two (92) and $\frac{5}{100}$ feet, more or less, to the northeast corner of Marchessault street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street forty-six (46) and $\frac{40}{100}$ feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five (95) and $\frac{20}{100}$ feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning, together with the appurtenances thereof.

That there is now constructed and situated upon said lot of land a certain building and structure which is known and designated as follows: Numbers 501, 503, 505, 507, 507½, 509 Lower Main street

or Main street; numbers 2, 4, 6, 8, and 10 Upper Main street,
5 and numbers 1, 2, and 3 at the junction of Main and Marchessault streets.

That the real property hereinabove mentioned and referred to is situated at the junction of what is known as Main street, Upper Main street, and Lower Main street, in said city of Los Angeles; and that, as plaintiff is informed and verily believes and upon his information and belief avers, said lot and building is and was at all the dates and times herein mentioned the only real property which is owned by said defendant, and is situated at the junction of said Main street, Upper Main street, and Lower Main street, in said city of Los Angeles, and is and was at all the dates and times herein mentioned the only real property belonging to said defendant Howes in said city of Los Angeles which is bounded on the west by Upper Main street and on the east by Lower Main street, and which fronts on Main street so called.

That on the 1st day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business and continuously since said last-named day have been and are now doing business at said city of Los Angeles under the firm name and style of D. Knox & Co., and as such were carrying on the business of plumbing, gas-fitting, and tin-roofing; that at all the dates and times aforesaid said firm of D. Knox & Co. and said parties
6 constituting said firm were, and they are now, mechanics and material men residing and doing business in said city of Los Angeles.

That on the 4th day of October, 1887, and on divers dates thereafter to and including the 5th day of March, 1888, said firm of D. Knox & Co., as mechanics and material men as aforesaid, at the personal instance of said defendant, F. C. Howes, performed labor upon and furnished material to be used and which were actually used in the construction of said building so erected and situated as aforesaid upon the lot of land hereinabove particularly described, to wit, the labor and materials to be used and which were used in and about the plumbing, gas-fitting, and roofing thereof.

That said labor performed and said materials so furnished were of the fair and reasonable value of $1,235.24; that at the dates and times said labor was so performed and said materials were so furnished as aforesaid said firm of D. Knox & Co. was not nor was any member of said firm the contractor or a contractor with said defendant, F. C. Howes, for the construction of said building and structure; that no part of said sum of $1,235.24 has been paid, and the same is now wholly due and payable from the said defendant, F. C. Howes.

That, as plaintiff is informed and believes and upon his in-
7 formation and belief avers, said building and structure was completed on the 6th day of March, 1888; that after the completion thereof and within thirty (30) days after the completion of the same, to wit, on said 6th day of March, 1888, said firm of D. Knox & Co. duly filed for record with the county recorder of said county of Los Angeles, being the county in which said real prop-

erty is situated, a claim containing a statement of their demand after deducting all just credits and offsets, to wit, a statement of their demand for said labor so performed and for said materials so furnished as aforesaid and for said amount of $1,235.24, the value thereof; that said claim so filed for record as aforesaid also contained the name of the owner and the name of the reputed owner of said land and of said building and structure, to wit, the name of said defendant, F. C. Howes; that said claim so filed for record as aforesaid also contained the name of the person by whom said firm of D. Knox & Co. was employed and to whom it furnished materials as aforesaid, to wit, the name of W. E. Lane, who, as plaintiff is informed and believes and upon his information and belief avers, was the contractor with said defendant, F. C. Howes, for the erection of said building and structure and was the agent of said defendant, F. C. Howes, in and about the employment of said firm of D. Knox & Co. to perform the labor and furnish the materials aforesaid;

8 that said claim so filed for record as aforesaid also contained a statement of the terms, time given, and conditions of the contract of said D. Knox & Co. under which they were to and did perform said labor and furnish said materials, to wit, that they should furnish the plumbing, gas-fitting, and roofing of said building and structure and the supplies or materials necessary therefor at and for the price at which said labor and materials were usually performed and furnished; that said claim, so filed for record as aforesaid, also contained a description of the property to be charged with the lien of said D. Knox & Co. for said labor and materials, sufficient for the identification thereof, to wit, that certain lot or parcel of land situated in the city of Los Angeles, in the county of Los Angeles, and described as follows: That certain lot and building situated at the junction of Main, Upper Main, and Lower Main streets, being bounded on the west by Upper Main street and on the east by Lower Main street and on the north by Main street, having a frontage of about thirty-five (35) ft. on Main street and running back about seventy (70) feet north, between Upper and Lower Main streets, and that said claim, so filed for record as aforesaid, was duly verified by the oath of D. Knox, one of the members of said firm of D. Knox & Co., and was, on said 6th day of March, duly

9 recorded by the county recorder of said county of Los Angeles pursuant to law.

That within thirty (30) days after the completion of said building and structure, to wit, on the 5th day of April, 1888, said firm of D. Knox & Co. duly filed for record with the county recorder of said county of Los Angeles a claim containing a statement of their demand after deducting all just credits and offsets, to wit, for the said demand of said firm for said labor performed and materials furnished as aforesaid in the amount of $1,235.24, containing also the name of said defendant, F. C. Howes, as the name of the owner and of the reputed owner of said building and structure and of said lot of land upon which the same was constructed and is situated as aforesaid, and also containing the name of W. E. Lane as the name of the person by whom said firm was employed and to whom it

furnished said materials, and who, as the agent of said owner, F. C. Howes, employed said firm to perform said labor and furnish said materials, together with a statement of the terms, time given, and conditions of their said contract, to wit, that said labor and materials were to be paid for in United States gold coin as soon as said labor was performed and said materials were furnished; and also a description of the property to be charged with the lien of the firm of said D. Knox & Co. sufficient for the identification of said
10 property, to wit, a description of said real property as the same is firstly herein bounded and particularly described. Said last-named claim was duly verified by the oath of said P. R. Tipton, one of the members of said firm of D. Knox & Co., and that said claim was, on said 5th day of April, 1888, duly recorded by the county recorder of said county of Los Angeles pursuant to law.

That said firm of D. Knox & Co. paid for filing and recording said lien the sum of $1.90.

That, as plaintiff is informed and believes and upon his information and belief avers, said firm of D. Knox & Co. paid for filing and recording their said lien firstly hereinabove mentioned and referred to the sum of $1.90.

That on the 12th day of April, 1888, said firm of D. Knox & Co., for value, sold, assigned, transferred, and set over to this plaintiff their said claim and demand for labor performed and materials furnished as aforesaid, and also their said lien and right of lien therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and of said lien and entitled to enforce and collect the same and receive all moneys due or to become due on account thereof.

That the whole of the lot of land hereinbefore particularly described is required for the convenient use and occupation of
11 said building, and that at the commencement of the work and of the furnishing of materials for said building and structure by said D. Knox & Co. said land and the whole thereof belonged to said defendant, F. C. Howes, who then and now owns a fee-simple estate therein.

II.

And for further and separate cause of action plaintiff avers—

That the defendant, F. C. Howes, is and at all the times hereinafter mentioned was the reputed owner and was also the owner and seized in fee of all that certain lot, piece, or parcel of land situated in the city of Los Angeles, in the county of Los Angeles and State of California, and bounded and more particularly described as follows:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two (92) and $\frac{5}{100}$ feet, more or less, to the northeast corner of Marchessault street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street forty-six (46) and $\frac{40}{100}$ feet to the north-

west corner of Main and Marchessault streets; thence north
12 37 deg. east along said line of Main street ninety-five (95) and $\frac{90}{100}$ feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning, together with the appurtenances thereof.

That there is now constructed and situated upon said lot of land a certain building and structure which is known and designated as follows: Numbers 501, 503, 507, 507½, 509 Lower Main street, or Main street; numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3 at the junction of Main or Marchessault streets.

That the real property hereinafter mentioned and referred to is situated at the junction of what is known as Main street, Upper Main street, and Lower Main street, in said city of Los Angeles, and that, as plaintiff is informed and verily believes and upon his information and belief avers, said lot and building is and was at all the dates and times herein mentioned the only real property which is owned by said defendant, and is situated at the junction of said Main street, Upper Main street, and Lower Main street, in said city of Los Angeles, and is and was at all the dates and times herein mentioned the only real property belonging to said defendant Howes in said city of Los Angeles which is bounded on the west by Upper
13 Main street and on the east by Lower Main street, and which fronts on Main street so called.

That on the 1st day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business and continuously since said last-named day have been and are now doing business at said city of Los Angeles under the firm name and style of D. Knox & Co., and as such were carrying on the business of plumbing, gas-fitting, and tin-roofing; that at all the dates and times aforesaid said firm of D. Knox & Co. and said parties constituting said firm were and they are now mechanics and material men residing and doing business in said city of Los Angeles.

That on the 4th day of October, 1887, and on divers dates thereafter to and including the 5th day of March, 1888, said firm of D. Knox & Co., as mechanics and material men as aforesaid, performed labor upon and furnished materials to be used and which were actually used in the construction of said building so erected and situated as aforesaid upon the lot of land hereinabove particularly described, to wit, the labor and materials to be used and which were used in and about the plumbing, gas-fitting, and roofing thereof; that said labor so performed and said materials so furnished were of a reasonable value of $1,235.24; that no part
14 of said sum of $1,235.24 has been paid, and that the same is now wholly due and owing for said labor and materials.

That said labor was so performed and said materials so furnished as aforesaid at the instance and request of one W. E. Lane, who, as plaintiff is informed and believes, and upon his information and belief avers, was during the period aforesaid the contractor with said defendant, F. C. Howes, for the construction of said building and structure and the person having charge of the

construction and erection thereof, and who was also during said period the agent of said defendant, F. C. Howes, in and about the construction of said building and structure and the employment of labor and the procurement of the materials to be done and furnished thereof.

That on or about the 4th day of October, 1887, at said city of Los Angeles, the said defendant, W. E. Lane, was engaged in the erection of said building and structure of said defendant, F. C. Howes, and as contractor with and agent of said defendant Howes, as hereinabove alleged.

That at the time last aforesaid said defendant, W. E. Lane, while acting as contractor and agent as aforesaid, did make and enter into a certain contract with said firm of D. Knox & Co., whereby he employed said firm of D. Knox & Co. to, and said firm of D. Knox & Co. undertook and agreed to, furnish, supply, put into,
15 affix, and put into said building and structure the plumbing, gas-fitting, and tin-roofing required therefore, and to supply the materials and to perform the labor in and about such plumbing, gas-fitting, and tin-roofing, and whereby said defendant, W. E. Lane, then and there undertook and agreed to pay to said defendant, D. Knox & Co., for such labor and materials the usual and customary price and charge therefor and what said materials and labor were fairly and reasonably worth.

That pursuant to said contract and agreement said firm of D. Knox & Co., between said 4th day of October, 1887, and said 5th day of March, 1888, furnished certain water-pipe, gas-pipe, fixtures, tin, and other materials and performed labor to be used and which was used in such plumbing, gas-fitting, and tin-roofing, and in the construction of said building and structure as aforesaid, of all of which said defendant, F. C. Howes, then had full notice and knowledge; that said materials and labor are the same materials and labor hereinbefore mentioned and were of the value hereinbefore alleged.

That, as plaintiff is informed and believes, and upon his information and belief avers, said building and structure was completed on the 6th day of March, 1888; that after the completion thereof and within thirty (30) days after the completion of the same,
16 to wit, on said 6th day of March, 1888, said firm of D. Knox & Co. duly filed for record with the county recorder of said county of Los Angeles, being the county in which said real property is situated, a claim containing a statement of their demand, after deducting all just credits and offsets, to wit, a statement of their demand for said labor so performed and for said materials so furnished as aforesaid and for said amount of $1,235.24, the value thereof; that said claim so filed for record as aforesaid also contained the name of the owner and the name of the reputed owner of said land and of said building and structure, to wit, the name of said defendant, F. C. Howes; that said claim so filed for record as aforesaid also contained the name of the person by whom said firm of D. Knox & Co. was employed, and to whom it furnished materials as aforesaid, to wit, the name of W. E. Lane, who, as plaintiff is in-

formed and believes, and upon his information and belief avers, was the contractor with said defendant, F. C. Howes, for the erection of said building and structure and was the agent of said defendant, F. C. Howes, in and about the employment of said firm of D. Knox & Co. to perform the labor and furnish the materials aforesaid; that said claim so filed for record as aforesaid also contained a statement of the terms, time given, and conditions of the
17 contract of said D. Knox & Co. under which they were to and did perform said labor and furnish said materials, to wit, that they should furnish the plumbing, gas-fitting, and roofing of said building and structure and the supplies or materials necessary therefor at and for the price at which said labor and materials were usually performed and furnished; that said claim so filed for record as aforesaid also contained a description of the property to be charged with the lien of said D. Knox & Co. for said labor and materials sufficient for the identification thereof, to wit, that certain lot or parcel of land situated in the city of Los Angeles, in the county of Los Angeles, and described as follows: That certain lot and building situated at the junction of Main, Upper Main, and Lower Main streets, being bounded on the west by Upper Main street and on the east by Lower Main street and on the north by Main street, having a frontage of about thirty-five (35) feet on Main street and running back about seventy (70) feet north, between Upper and Lower Main streets, and that said claim so filed for record as aforesaid was duly verified by the oath of D. Knox, one of the members of said firm of D. Knox & Co., and was on 6th day of March duly recorded by the county recorder of said county of Los Angeles pursuant to law.

That within thirty (30) days after the completion of said
18 building and structure, to wit, on the 5th day of April, 1888, said firm of D. Knox & Co. duly filed for record with the county recorder of said county of Los Angeles a claim containing a statement of their demand after deducting all just credits and offsets, to wit, for the said demand of said firm for said labor performed and material furnished as aforesaid in the amount of $1,235.24, containing also the name of said defendant, F. C. Howes, as the name of the owner and of the reputed owner of said building and structure and of said lot of land upon which the same was constructed and is situated as aforesaid, and also containing the name of W. E. Lane as the name of the person by whom said firm was employed and to whom it furnished said materials, and who, as the agent of said owner, F. C. Howes, employed said firm to perform said labor and furnish said materials, together with a statement of the terms, time given, and conditions of their said contract, to wit, that said labor and materials were to be paid for in United States gold coin as soon as said labor was performed and said materials were furnished, and also a description of the property to be charged with the lien of the firm of said D. Knox & Co. sufficient for the identification of said property, to wit, a description of said real property as the same is firstly herein bounded and particularly de-

scribed. Said last-named claim was duly verified by the oath
19 of said P. R. Tipton, one of the members of said firm of D. Knox & Co., and that said claim was on said 5th day of April, 1888, duly recorded by the county recorder of said county of Los Angeles pursuant to law.

That said firm of D. Knox & Co. paid for filing and recording said lien the sum of $1.90.

That, as plaintiff is informed and believes, and upon his information and belief avers, said firm of D. Knox & Co. paid for filing and recording their said lien firstly hereinabove mentioned and referred to the sum of $1.90.

That on the 12th day of April, 1888, said firm of D. Knox & Co., for value, sold, assigned, transferred, and set over to this plaintiff their said claim and demand for labor performed and materials furnished as aforesaid, and also their said lien and right of lien therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and of said lien, and entitled to enforce and collect the same, and receive all moneys due or to become due on account thereof.

That the whole of the lot of land hereinbefore particularly described is required for the convenient use and occupation of said building, and that at the commencement of the work and of the furnishing of materials for said building and structure by said D. Knox & Co. said land and the whole thereof belonged to said
20 defendant, F. C. Howes, who then and now owns a fee-simple estate therein.

III.

And for a further and seperate cause of action plaintiff alleges—

That the defendant, F. C. Howes, is and at all the times hereinafter mentioned was the owner and reputed owner of all the land and premises situated in the city and county of Los Angeles, State of California, and described as follows, to wit:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west, along the east line of Upper Maine street ninety-two (92) and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street forty-six (46) and $\frac{40}{100}$ feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five (95) and $\frac{30}{100}$ feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along the line of said Amestoy to place of beginning, together with the appurtenances thereof.

21 That the building upon said lot of land is numbered as follows: Numbers 501, 503, 507, 507½, and 509 Lower Main or Main street, numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3, junction of Main and Marchessault streets.

That plaintiff is informed and believes, and on such information and belief alleges the fact to be, that at all the times hereinafter mentioned the said defendants had entered into a contract with each other, under and by the terms of which the said W. E. Lane was to construct and erect for defendant Howes that certain building aforesaid situated on said described land.

That, as plaintiff is informed and believes, and on his information and belief avers, said contract was never reduced to writing nor subscribed by the parties thereto or either of them, and that said contract was not, nor was any memorandum thereof, filed in the office of the county recorder of said county of Los Angeles, either before the construction of said building or the work thereon was commenced or at any other times, and that the amount agreed to be paid thereunder by the said defendant Howes to the said defendant Lane exceeded and exceeds the sum of one thousand ($1,000) dollars.

That on or about the 4th day of October, A. D. 1887, the said defendant, W. E. Lane, was engaged in erecting the aforesaid
22 building for the said defendant, F. C. Howes, and as his agent, and was the person in charge of the construction thereof.

That at the last-mentioned times the said W. E. Lane, then and there being the agent of the said Howes and acting as aforesaid, did make and enter into a contract with D. Knox & Co., of the said city of Los Angeles, whereby said D. Knox & Co. undertook and agreed to furnish, supply, put into, and affix in and upon said building the material, plumbing, gas-fitting, and tin-roofing required for the complete completion of the same, and whereby the said W. E. Lane then and there undertook and agreed to pay to the said D. Knox & Co., in United States gold coin, so much as the said material and the labor of putting in and affixing the same to said building should be reasonably worth.

That in pursuance of said contract and agreement the said D. Knox & Co. did, between the 4th day of October, 1887, and the 5th day of March, 1888, furnish certain water pipe and fixtures and gas pipe and fixtures and tin and other materials, and did put in, upon, and affix the same to said building in the construction of said building under and by the direction of the said defendant, W. E. Lane, and of which defendant, F. C. Howes, had full knowledge; a full and itemized account of which material and labor so fur-
23 nished and performed is hereunto annexed and marked Exhibit "A" and made a part of this complaint.

That the said material so furnished and the labor so performed as aforesaid in the construction of said building was reasonably worth the sum of twelve hundred and thirty-five and $\frac{24}{100}$ dollars.

And it was also understood and agreed by and between said D. Knox & Co. and said W. E. Lane the said sum should be paid in United States gold coin, and that the same is so payable.

That within thirty (30) days after the completion of said building and structure, to wit, on the 5th day of April, 1888, said firm of D. Knox & Co. duly filed for record with the county recorder of said

county of Los Angeles a claim containing a statement of their demand after deducting all just credits and offsets, to wit, for the said demand of said firm for said labor performed and materials furnished as aforesaid in the amount of $1,235.24, containing also the name of said defendant, F. C. Howes, as the name of the owner and of the reputed owner of said building and structure and of said lot of land upon which the same was constructed and is situated as aforesaid, and also containing the name of W. E. Lane as the name of the person by whom said firm was employed and to whom
24 it furnished said materials, and who, as the agent of said owner, F. C. Howes, employed said firm to perform said labor and furnish said materials, together with a statement of the terms, time given, and conditions of their said contract, to wit, that said labor and materials were to be paid for in United States gold coin as soon as said labor was performed and said materials were furnished, and also a description of the property to be charged with the lien of the firm of said D. Knox & Co. sufficient for the identification of said property, to wit, a description of said real property as the same is firstly herein bounded and particularly described. Said last-named claim was duly verified by the oath of said P. R. Tipton, one of the members of said firm of D. Knox & Co., and that said claim was, on said 5th day of April, 1888, duly recorded by the county recorder of said county of Los Angeles pursuant to law.

That said firm of D. Knox & Co. paid for filing and recording said lien the sum of $1.90.

That on the 12th day of April, 1888, said firm of D. Knox & Co., for value, sold, assigned, transferred, and set over to this plaintiff their said claim and demand for labor performed and materials furnished as aforesaid, and also their said lien and right of lien therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and
25 of said lien and entitled to enforce and collect the same and receive all moneys due or to become due on account thereof.

That no part of the said item of twelve hundred and thirty-five $\frac{24}{100}$ (1,235.24) dollars has been paid, and the same is now wholly due and payable from defendants to plaintiff; that the sum of $150.00 is a reasonable sum for attorney's fees in prosecuting this suit in the superior court.

That the whole of the lot of land hereinbefore particularly described is required for the convenient use and occupation of said building, and that at the commencement of the work and of the furnishing of materials for said building and structure by said D. Knox & Co. said land and the whole thereof belonging to said defendant, F. C. Howes, who then and now owns a fee-simple estate therein.

That the said defendant, Lane, has been, by the decree of said court duly made and entered in the case of W. E. Lane, insolvent, *vs.* his creditors, adjudged insolvent, and the defendant, F. W. Dearborn, has been, by decree of said court in said insolvency proceedings duly given, made, and entered, appointed assignee of said insolvent, and duly qualified as such.

Wherefore plaintiff prays judgment for the sum of $1,391.20, and the same adjudged a lien against the lot of land described.

26 That said premises, building, and appurtenances above described, to the extent of the interest of said defendants therein, be adjudged and decreed to be sold by the sheriff of Los Angeles county according to law and the practice of this court, and that the proceeds of such sale be applied to the payment of the costs of these proceedings and the sale, and reasonable attorney's fees of one hundred and fifty dollars, and said plaintiff's claim, amounting to said sum of $1,241.20, and also for the claim of any other lienholders, if any such there be, on said property who shall come in and be duly made parties to this action, and for costs of suit.

That plaintiff be allowed a reasonable sum for attorney's fees by said court and his costs in preferring and recording said lien.

That plaintiff or any other parties to this suit may become purchasers at such sale.

That such plaintiff may have such other and further order and relief in the premises as the case may require and as to the court may seem just.

DAVIS & TAYLOR,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Filed May 21, 1888.

27 (Title of court and cause.)

Answer.

The defendant, F. C. Howes, answers the first count of the complainant, and alleges—

That he has no information or belief on the subject sufficient to enable him to answer the allegation of the complaint—

That on the first day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business, and continuously since last-named day have been and are now doing business, at said city of Los Angeles under the firm name and style of D. Knox & Co., and as such were carrying on the business of plumbing, gas-fitting, and tin-roofing; that at all the dates and times aforesaid said firm of D. Knox & Co. and said parties constituting said firm were and they are now mechanics and materialmen residing and doing business in said city of Los Angeles.

And he therefore denies that on the first day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business, or that they have since said last-named day continuously or at all been or are now doing business, at said city of Los Angeles under the firm name and style of D. Knox & Co., or that said parties constituting said firm were or now are mechanics

28 or materialmen residing or doing business in said city of Los Angeles or at all.

That he denies that on the 4th day of October, 1887, or on divers dates thereafter to and including the 5th day of March, 1888, or at

any time said firm of D. Knox & Co., as mechanics or materialmen as aforesaid or at all, ever performed any labor upon or furnished materials to be used or which were actually used in the construction of the building mentioned and described in the complaint in and about the plumbing, gas-fitting, or roofing thereof or otherwise at the personal instance of this defendant.

That he denies, on information and belief, that the labor so alleged to have been performed and the materials so alleged to have been furnished were of the fair and reasonable value of $1,235.24 or of any other value in excess of $700.00.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint that no part of said sum of $1,235.24 has been paid, and he therefore denies the same, and he denies that the same is now due or payable from this defendant wholly or in part.

That he denies that said building and structure was completed on the 6th day of March, 1888, and alleges, upon his information
29 and belief, that the same was completed on the 26th day of February, 1888; that he admits that W. E. Lane was the contractor with this defendant for the erection of said building and structure, but he denies that the said W. E. Lane was the agent of this defendant in and about the employment of said firm of D. Knox & Co. to perform the labor or furnish the materials aforesaid or otherwise.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint—

That on the 12th day of April, 1888, said firm of D. Knox & Co., for value, sold, assigned, transferred, and set over to this plaintiff their said claim and demand for labor performed and for materials furnished as aforesaid, and also their said lien and right of lien therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and of said lien and entitled to enforce and collect the same and receive all moneys due or to become due on account thereof.

And he therefore denies that on the 12th day of April, 1888, or at any other time said firm of D. Knox & Co., for value or otherwise, sold, assigned, transferred, or set over to the plaintiff their said claim and demand for labor performed and materials furnished as aforesaid or their said lien or right of lien therefor, or that
30 at any time since said last-named day plaintiff has been or now is a holder or owner of said claim and demand or of said lien or entitled to enforce or claim the same or to receive all moneys due or to become due on account thereof or any part thereof.

And the defendant answers the second count of the complaint, and alleges—

That he has no information or belief on the subject sufficient to enable him to answer the allegation of the complaint—

That on the first day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business, and continuously since last-named day have been and are now doing business, at said city of Los Angeles under the firm name and style

of D. Knox & Co., and as such were carrying on the business of plumbing, gas-fitting, and tin-roofing; that at all the dates and times aforesaid said firm of D. Knox & Co. and said parties constituting said firm were and they are now mechanics and materialmen residing and doing business in said city of Los Angeles.

And he therefore denies that on the first day of October, 1887, D. Knox, P. R. Tipton, D. C. Golden, and A. Leverenz were copartners doing business, or that they have since the last-named day continuously or at all been or are now doing business, at said city of
31 Los Angeles under the firm name and style of D. Knox & Co., or that said parties constituting said firm were or are now mechanics or materialmen residing and doing business in said city of Los Angeles or at all.

That he has no information or belief on the subject sufficient to enable him to answer the allegation of the complaint—

That on the 4th day of October, 1887, and on divers dates thereafter to and including the 5th day of March, 1888, said firm of D. Knox & Co., as mechanics and materialmen as aforesaid, performed labor upon and furnished materials to be used and which were actually used in the construction of said building so erected and situated as aforesaid upon the lot of land hereinbefore particularly described, to wit, that labor and materials to be used in and about the plumbing, gas-fitting, and roofing thereof.

And he therefore denies that on the 4th day of October, 1887, or on divers dates thereafter to and including the 5th day of March, 1888, or at any time said firm of D. Knox & Co., as mechanics or materialmen or at all, performed any labor upon or furnished any materials to be used or which were actually used in the construction of said building so erected and situated as aforesaid upon the lot of ground in the complaint particularly described in and about the plumbing, gas-fitting, or roofing thereof or otherwise.

32 He denies, upon his information and belief, that the labor so alleged to have been performed or the materials so alleged to have been furnished were of the reasonable value of $1,235.24 or of any value whatever in excess of $700.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint.—

That no part of said sum of $1,235.24 has been paid, and that the same is now due and owing for said alleged labor and materials, and he therefore denies the same.

He admits that the said W. E. Lane was contractor with him for the construction of said building and structure, but he denies that he was the person having charge of the construction and erection thereof, or who was, during the said period or at any time, the agent of this defendant otherwise than as such contractor in and about the construction of said building or structure or the employment of labor or the procurement of materials to be done and furnished therefor.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint *that*—

That at the time last aforesaid said defendant, W. E. Lane, while acting as contractor and agent as aforesaid, did make and enter
33 into a certain contract with said firm of D. Knox & Co. to, and said firm of D. Knox & Co. undertook and agreed to, furnish, supply, and put into, affix and put into said building and structure the plumbing, gas-fitting, and tin-roofing required therefor, and to supply the materials and to perform the labor in and about such plumbing, gas-fitting and tin-roofing, and whereby said defendant, W. E. Lane, then and there undertook and agreed to pay to said defendant, D. Knox & Co., for such labor and materials the usual and customary price and charge therefor what said materials and labor were fairly and reasonably worth.

And he therefore denies that at the time last aforesaid or at any time said defendant, W. E. Lane, while acting as contractor or agent as aforesaid or otherwise, did make or enter into any contract with said firm of D. Knox & Co. to, or that said firm of D. Knox & Co. did undertake or agree to, furnish, supply, or put into, affix or put into, said building or structure the plumbing, gas-fitting, or tin-roofing required therefor, or to supply any materials or to perform any labor in and about such plumbing, gas-fitting, or tin-roofing, or that the said defendant, W. E. Lane, thereby then and there or at all undertook or agreed to pay to said D. Knox & Co. for such labor or materials the usual or customary or any price or to charge therefor what said materials or labor were fairly or reason-
34 ably worth or any other sum whatever.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint—

That pursuant to said contract and agreement said firm of D. Knox & Co., between said 4th day of October, 1887, and said 5th day of March, 1888, furnished certain water-pipe, gas-pipe, fixtures, tin and other materials and performed labor to be used and which was used in such plumbing, gas-fitting, and tin-roofing and in the construction of said building and structure as aforesaid.

And he therefore denies that the said firm of D. Knox & Co., between said 4th day of October, 1887, and said 5th day of March, 1888, or at any time, furnished certain water-pipe, gas-pipe, fixtures, tin or any other materials or performed labor to be used or which was used in plumbing, gas-fitting, or tin-roofing or otherwise in the construction of said building and structure aforesaid.

And he denies that this defendant then or at all had full notice or knowledge or any notice or knowledge of said alleged work or labor.

He denies that said building and structure was completed the 6th day of March, 1888, and alleges, upon his information and belief, that the same was completed on the 26th day of February, 1888.

35 That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint—

That on the 12th day of April, 1888, said firm of D. Knox & Co. for value, sold, assigned, transferred, and set over to this plaintiff *and* their said claim and demand for labor performed and for materials furnished as aforesaid, and also their said lien and right of lien

therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and of said lien and entitled to enforce and collect the same and receive all moneys due or to become due on account thereof.

And he therefore denies that on the 12th day of April, 1888, or at any time said firm of D. Knox & Co., for value or otherwise, sold, assigned, transferred, or set over to the plaintiff their said claim and demand for labor performed and materials furnished as aforesaid or their said lien or right of lien therefor, or that at any time since said last-named day plaintiff has been and now is a holder or owner of said claim and demand or of said lien or entitled to enforce or claim the same or to receive all moneys due or to become due on account thereof or any part thereof.

And the defendant answers the third count of the complaint, and alleges—

That he denies that the contract between W. E. Lane and
36 this defendant referred to in the complaint was not reduced to writing and was not subscribed by the parties thereto, and alleges the fact to be that said contract was reduced to writing and was subscribed by the parties and by both of them. He admits that on or about the 4th day of October, 1887, the defendant, W. E. Lane, was engaged in erecting the said building for this defendant, and alleges that he was so engaged under his contract with this defendant as aforesaid, but he denies that he was otherwise the agent of this defendant, and he denies that he was the person in charge of the construction of said building.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint—

That at the last-mentioned times the said W. E. Lane, then and there being the agent of the said Howes and acting as aforesaid, did make and enter into a contract with D. Knox & Co., of the said city of Los Angeles, whereby said D. Knox & Co. undertook and agreed to furnish, supply, put into, and affix in and upon said building the material, plumbing, gas-fitting, and tin-roofing required for the complete completion of the same, and whereby the said W. E. Lane then and there undertook and agreed to pay to the said D. Knox & Co.,
in United States gold coin, so much as the said material and
37 the labor of putting in and affixing the same to said building should be reasonably worth.

And he therefore denies that the said W. E. Lane did at any time make or enter into a contract with D. Knox & Co., of the said city of Los Angeles, whereby said D. Knox & Co. undertook or agreed to furnish, supply, put into, or affix in or upon said building the material, plumbing, gas-fitting, or tin-roofing required for the complete completion of the same, or otherwise or at all; and he denies that the said W. E. Lane thereby then and there or at all undertook or agreed to pay to the said D. Knox & Co., in United States gold coin or otherwise, or at all, so much as the said material or the labor of putting in or affixing same to the said building should be reasonably worth.

That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint.

That in pursuance of said contract and agreement the said D. Knox & Co. did, between the 4th day of October, 1887, and the 5th day of March, 1888, furnish certain water pipe and fixtures and gas pipe and fixtures and tin and other materials, and did put in, upon, and affix the same to said building in the construction of said building under and by the direction of the said defendant, W. E. Lane, and of which defendant, F. C. Howes, had full knowledge.

38 A full and itemized account of which material and labor so furnished and performed is hereunto annexed and marked Exhibit "A," and made a part of this complaint.

And he therefore denies that the said D. Knox & Co., in pursuance of said alleged contract or agreement, or at all, between the 4th day of October, 1887, and the 5th day of March, 1888, or at any other time, furnished certain water pipe or fixtures or gas pipe and fixtures or tin or other materials, or did put in, upon, or affix same to the same building in the construction of said building, or that they furnished or performed any of the materials or labor mentioned in the account annexed to the complaint and marked Exhibit "A" under or by the directions of said W. E. Lane or otherwise or at all.

And he denies that this defendant had any knowledge of such alleged materials being furnished or of such alleged work being done.

That he denies upon his information and belief that the said materials so alleged to have been furnished and the labor so alleged to have been performed in the construction of said building was reasonably worth the sum of $1,235.24 or any other sum in excess of $700.

That he denies that the claim for a lien recited in this count of the complaint was filed within thirty days after the completion of said building and structure.

39 That he has no information or belief upon the subject sufficient to enable him to answer the allegation of the complaint.

That on the 12th day of April, 1888, said firm of D. Knox & Co., for value, sold, assigned, transferred, and set over to this plaintiff their said claim and demand for labor performed and for materials furnished as aforesaid, and also their said lien and right of lien therefor, and that at all times since said last-named day plaintiff has been and is the holder and owner of said claim and demand and of said lien and entitled to enforce and collect the same and receive all moneys due or to become due on account thereof.

And he therefore denies that on the 12th day of April, 1888, or at any other time, said firm of D. Knox & Co., for value or otherwise, sold, assigned, transferred or set over to the plaintiff their said claim and demand for labor performed and materials furnished as aforesaid, or their said lien or right of lien therefor, or that at any time since said last-named day plaintiff has been or now is a holder or owner of said claim and demand or of said lien, or entitled to en-

force or claim the same, or to receive all moneys due or to become due on account thereof or any part thereof.

And for a second defense this defendant alleges, upon information and belief, that the building and structure mentioned in
40 the complaint was completed on the 26th day of February, 1888.

And for a third defense he alleges:

1. That on the 12th day of September, 1887, and the 31st day of October, 1887, he entered into certain contracts in writing with one W. E. Lane for the construction and erection of the building and structure upon the lot of ground mentioned in the complaint, copies of which said written contract are hereto annexed, marked Exhibit "A" and "B," and made part of this answer.

2. That the building mentioned in said contract is the same building mentioned in the complaint, and that the same, as this defendant is informed and believes, was completed on the 26th day of February, 1888.

3. That this defendant well and truly performed and kept all the provisions and conditions of said contract and paid the moneys therein mentioned by him to be paid to the said W. E. Lane at the times and in the manner therein provided, except the sum of $875, being twenty-five per cent. of the amount named in the second contract, which amount he still holds in his hands and is ready to pay to mechanics and materialmen employed by the said Lane in and about the construction of said building, as the court may direct.

4. That liens have been filed by the mechanics and material-
41 men against said building and premises for various sums, aggregating the sum of $5,643.65, and actions have been begun against this defendant to enforce a number of said claims, aggregating the sum of $4,397.63, and other like actions have been threatened.

5. That the said D. Knox & Co. did not at any time give notice to this defendant in writing or otherwise that they had performed labor or furnished material to the said W. E. Lane or that they had agreed so to do until long after the completion of the said building and long after the filing of their first claim for a lien mentioned and alleged in the complaint, to wit, until the 11th day of March, 1888.

6. That on the day and year last aforesaid this defendant, in accordance with the terms of his contract with said W. E. Lane as aforesaid, has paid to the said Lane the whole contract price aforesaid except the sum of $875 aforesaid.

And for a fourth defense he alleges:

To avoid useless repetition, he alleges here by reference to his third defense the facts therein alleged; and, further answering, he alleges that before the commencement of this action, to wit, on the 11th day of May, 1888, he gave notice to the plaintiff and the said D. Knox & Co. that he had in his hands $875 which was still due the contractor under his contract, being the sum of twenty-
42 five per cent. retained until thirty-five days after the comple-

tion of the building, and that he was willing to divide this amount *pro rata* between the different lien claimants.

And for a fifth defense he alleges:

1. That on the 12th day of September, 1887, and the 31st day of October, 1887, he entered into certain contracts in writing with one W. E. Lane for the construction and erection of the building and structure upon the lot of ground mentioned in the complaint, copies of which said written contracts are hereto annexed and marked Exhibit "A" and "B" and made part of this answer.

2. That he alleges, upon his information and belief, that at all the times mentioned in the complaint the said D. Knox & Co. had full notice and knowledge of said contract.

HAYNES & MITCHELL,
Attorneys for the Defendant, F. C. Howes.

(Exhibit "A" and "B," annexed to the answer, appear in the statement *post*, and are therefore omitted here.)

43 In the Superior Court in and for the County of Los Angeles, State of California.

THE WILLAMETTE STEAM MILLS LUMBERING AND MANUFACTURING COMPANY, a Corporation, Plaintiff,
vs.
F. C. HOWES and F. W. DEARBORN, Assignee, &c., of W. E. Lane, an Insolvent Debtor, Defendants.
} Complaint.

Plaintiff above named complains of defendants above named, and for cause of action alleges:

I.

That plaintiff is and was at all the times herein mentioned a corporation organized and existing under the laws of the State of Oregon and doing business in the city and county of Los Angeles, State of California, dealing in lumber and building material.

II.

44 That defendant, F. W. Dearborn, was, on the 7th day of April, 1888, nominated and appointed assignee of the estate of W. E. Lane, an insolvent debtor, by order of the superior court of Los Angeles county, State aforesaid, and he thereafter duly qualified, and ever since has been and now is the duly appointed, qualified, and acting assignee of the estate of said insolvent.

III.

That the defendant, F. C. Howes, is and at all the times herein mentioned was the owner and reputed owner and seized in fee of all that certain lot, piece, or parcel of land situate in the city and county of Los Angeles and State of California, and bounded and more particularly described as follows:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault and Upper Main streets; thence south 49 deg. 30 min. east along Marchessault street forty-six and $\frac{40}{100}$ feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five and $\frac{90}{100}$ feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along the line of said Amestoy to place of beginning, together with the appurtenances thereof.

That there is now constructed and situate upon said lot of land a certain building and structure which is known and designated as follows: Numbers 501, 503, 507, 507½, and 509 Lower Main street or Main street; numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3, at the junction of Main and Marchessault streets.

IV.

That on the 6th day of October, 1887, and on divers dates thereafter, to and including the 29th day of February, 1888, plaintiff furnished lumber at the personal instance and request of defendant, F. C. Howes, which lumber was to be used and was actually used in the construction of said building so erected and situated on said lot of land hereinbefore particularly described.

That said lumber so furnished by plaintiff was of the fair and reasonable value of $2,592.55; that at the dates and times said lumber was so furnished as aforesaid said plaintiff was not the contractor or a contractor with said defendant, F. C. Howes, for the construction of said building or any part thereof; that no part of said sum of $2,592.55 has been paid, and the whole thereof is now due and payable from the said defendant, F. C. Howes, to plaintiff.

V.

That said building and structure was completed and work stopped thereon on the 29th day of February, 1888; that after the completion thereof, and within 30 days after the completion thereof, to wit, on the 17th day of March, 1888, plaintiff duly filed for record with the county recorder of Los Angeles county, being the county in which said real property is situated, a claim containing a statement of its demand, after deducting all just credits and offsets, to wit, a statement of its demand for said lumber so furnished as aforesaid, and for said amount of $2,592.55, the value thereof; that said claim so filed for record as aforesaid also contained the name of the owner and reputed owner of said land and premises, to wit, the name of defendant, F. C. Howes; that said claim so filed for record as aforesaid also contained the name of the person by and with whom plaintiff agreed to furnish and to whom plaintiff did furnish

lumber as aforesaid, to wit, the name of W. E. Lane, who, as plaintiff is informed and believes, and upon such information and belief alleges, was the contractor with said defendant, F. C. Howes,
47 for the erection of said building, and was the agent of said defendant, F. C. Howes, in and about the purchase from plaintiff of said lumber for said building; that said claim so filed for record as aforesaid also contained a statement of the terms, time given, and conditions of the contract under which plaintiff was to and did furnish said lumber, to wit, that plaintiff agreed to furnish from time to time the lumber necessary to erect and construct said building, for which the plaintiff was to be paid, and said contractor agreed it should be paid, cash on demand, in gold coin of the United States, the reasonable value thereof; that said claim so filed for record also contained a description of the property sought to be charged with its lien for said lumber sufficient for identification thereof, to wit, the same description hereinbefore set forth in paragraph III of this complaint, to which reference is hereby had and which is expressly made part hereof, and that said claim so filed for record as aforesaid also was duly verified by the oath of J. A. Russ, the agent of said corporation in Los Angeles, and was on said 17th day of March, 1888, duly recorded by the county recorder of said county of Los Angeles pursuant to law.

VI.

That plaintiff paid for filing and recording said claim of lien the sum of $1.90.

48 VII.

That the whole of the lot of land hereinbefore described is required for the convenient use and occupation of said building; that at the commencement of the work and of the furnishing of materials for said building by plaintiff said land and the whole thereof belonged to said defendant, F. C. Howes, who then and now owns a fee-simple estate therein, and that said F. C. Howes did not nor did any one for him, within three days after he had obtained knowledge of the erection and construction of said building, or at all, give notice in writing or otherwise, posted upon said land or building, or at all, that he would not be responsible for said work; that plaintiff has demanded payment of its said claim from defendant, F. C. Howes, who has refused and still refuses to pay the same.

And for a further and distinct and separate cause of action plaintiff alleges:

I.

Plaintiff refers to paragraph I of the foregoing count, hereinbefore set out, and expressly makes it a part of this complaint on this separate and distinct count.

II.

Plaintiff refers to paragraph II of the foregoing count,
49 hereinbefore set out, and expressly makes it part of this com-

plaint on this separate and distinct count, and plaintiff further alleges as follows:

III.

That defendant, F. C. Howes, is and was at all the times herein mentioned and now is the owner and reputed owner of that certain real property situate in the city of Los Angeles, county of Los Angeles, State of California, bounded and described as follows, to wit:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault and Upper Main streets; thence south 49 deg. 30 min. east along Marchessault street forty-six and $\frac{40}{100}$ feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five and $\frac{20}{100}$ feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along the line of said Amestoy to the place of beginning, together with the appurtenances thereof, and the
50 building hereinafter mentioned was erected and constucted thereon with his knowledge and consent and for his benefit, and said owner and reputed owner did not nor did any one for him, within three days after he had obtained knowledge of the erection of said building, or at all, give notice in writing or otherwise, posted upon said land or building, that he would not be responsible for said work.

IV.

That, as plaintiff is informed and believes and on such information and belief alleges, defendant F. W. Dearborn's assignor, one W. E. Lane, entered into a contract with defendant F. C. Howes on or about the 1st day of November, 1887, to erect and construct a certain building, to wit, a brick building, on the said land hereinbefore described.

V.

That the price agreed upon in said contract for the erection and construction of said building, as plaintiff is informed and believes and on such information and belief alleges, exceeded the sum of one thousand dollars, and plaintiff alleges, on like information and belief, that said contract was not in writing and was not filed, nor was any memorandum thereof filed in the office of the county recorder of Los Angeles county before said work on said
51 building was begun or at all, and is therefore void as against this plaintiff under the provisions of section 1183 of chapter II, part III, title IV, of the Code of Civil Procedure of the State of California and amendments thereto.

VI.

That on or about the 6th day of October, 1887, plaintiff entered into an agreement with said W. E. Lane, assignor of defendant F. W. Dearborn, to furnish lumber to be used in the erection and construction of said building on said land, to be furnished from time to time as ordered, for so much as the same was reasonably worth, the same to be paid for, cash on demand, in gold coin of the United States, and in pursuance of said agreement plaintiff did, between the 6th day of October, 1887, and the 29th day of February, 1888, furnish to said W. E. Lane, who was then and there engaged in erecting said building for defendant, F. C. Howes, lumber to be used and which was actually used in the construction of said building on said land, which lumber was reasonably worth the sum of $2,592.55, on which nothing has been paid, leaving due and owing to said plaintiff the sum of two thousand five hundred and ninety-two and $\frac{55}{100}$ dollars for said lumber so furnished for and actually used in the
52 erection and construction of said building, after deducting all just credits and offsets, no part of which has been paid to plaintiff by these defendants or any one on their behalf or at all. A full itemized account of said lumber so furnished as aforesaid is hereunto annexed and marked Exhibit "A" and made a part of this complaint.

VII.

That said W. E. Lane commenced the work of erecting and constructing said building on said land with the knowledge and consent of said F. C. Howes, the owner and reputed owner of said land, on or about the 4th day of October, 1887, and said building was completed and the work thereon stopped by him on the 29th day of February, 1888, or thereabouts; that there is now due from said defendant, F. C. Howes, to plaintiff for lumber so as aforesaid furnished for and actually used in the construction and erection of said building the aforesaid sum of $2,592.55, in gold coin of the United States, no part of which has been paid, although plaintiff has demanded payment thereof of said contractor, W. E. Lane.

VIII.

That the whole of the land hereinbefore described is required for the convenient use and occupation of said building or structure.

53 That on the 17th day of March, 1888, and within 30 days after the completion of said building, the plaintiff, for the purpose of securing and perfecting a lien for the money so due it as aforesaid upon the building and lands mentioned hereinbefore, under the provisions of chapter II of part III, title IV, of the Code of Civil Procedure of the State of California, filed for record in the office of the county recorder of the said county of Los Angeles its claim therefor, duly verified by J. A. Russ, its agent and manager in Los Angeles, which claim contained a statement of its demand after deducting all just credits and offsets, to wit, a statement of its demand

for said lumber so furnished and actually used in the construction of said building as aforesaid, and for said amount of $2,592.55, the value thereof; that said claim so filed for record as aforesaid also contained the name of the owner and reputed owner of said land and premises, to wit, the name of defendant, F. C. Howes; that said claim so filed for record as aforesaid also contained the name of the person by and with whom plaintiff agreed to furnish and to whom plaintiff did furnish lumber for said building as aforesaid, to wit, the name of said contractor, W. E. Lane, who was, as plaintiff is informed and believes, and upon such information and belief alleges, the contractor with defendant, F. C. Howes, for the erection and construction of said building, and was the agent of de-
54 fendant, F. C. Howes, in and about the purchase from plaintiff of said lumber for said building.

That said claim so filed for record as aforesaid also contained a statement of the terms, time given, and conditions of the contract or agreement under which plaintiff was to and did furnish said lumber, to wit, the plaintiff agreed to furnish from time to time the lumber necessary to erect and construct said building, for which the plaintiff was to be paid, and said contractor agreed it should be paid, cash on demand, in gold coin of the United States, the reasonable value thereof.

That said claim so as aforesaid filed for record also contained a description of the property sought to be charged with its (said plaintiff's) lien for said lumber sufficient for identification thereof, to wit, the same description hereinbefore set forth in paragraph III of the second count of this complaint, to which reference is hereby had and which is expressly made part hereof.

That said claim was on said 17th day of March, 1888, duly recorded by the county recorder of Los Angeles county pursuant to law.

IX.

That the plaintiff paid for filing and recording said lien or claim of lien the sum of $1.90.

55 X.

That the sum of $250 is a reasonable attorney's fee for prosecuting this suit in the superior court.

XI.

That the whole of the lot of land hereinbefore particularly described is required for the convenient use and occupation of said building, and that at the commencement of the work on same and the furnishing of said lumber by plaintiff as aforesaid said land and the whole thereof belonged to said defendant, F. C. Howes, who then and now owns a fee-simple estate therein.

Wherefore plaintiff prays judgment for the sum of two thousand eight hundred and forty-four and $\frac{45}{100}$ dollars ($2,844.45), and that the same be adjudged a lien against the lot of land above described.

That said premises, building, and appurtenances above described, to the extent of the interest of said defendants herein, be judged and decreed to be sold by the sheriff of said Los Angeles county according to law and the practice of this court, and that the proceeds of such sale be applied to the payment of the costs of these proceedings and sale and reasonable attorney's fees of two hundred and
56 fifty dollars and said plaintiff's claim, amounting to said sum of two thousand five hundred and ninety-two and $\frac{55}{100}$ dollars, and also for the claim of any other lienholders, if any there be, on said property who shall come in and be duly made parties to this action, and for costs of suit.

That plaintiff be allowed a reasonable sum for attorney's fees by said court and its costs in preferring and recording this lien and costs of suit.

That plaintiff or any other party or parties to this suit may become purchasers at said sale, and for such other and further relief in the premises as the case may require and to the court may seem just.

JOHNSTON & BORDEN,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Filed May 29th, 1888.

57 In the Superior Court of Los Angeles County, State of California.

CHARLES J. MAITRE and HENRY C. HANSON, Copartners, Doing Business under the Firm Name and Style of Maitre & Hanson, Plaintiffs,
vs.
F. C. HOWES, W. E. LANE, and F. W. DEARBORN, Assignee of W. E. Lane, an Insolvent, Defendants. } Complaint.

Plaintiffs complain and for causes of action allege:

I.

That at all the times hereinafter mentioned the plaintiffs, Charles J. Maitre and Henry C. Hanson, were copartners, doing business in the city and county of Los Angeles, California, under the firm name and style of Maitre and Hanson.

That the defendant, F. C. Howes, is and at all the times hereinafter mentioned was the owner and reputed owner of all the land and premises situated in the city and county of Los Angeles,
58 State of California, and described as follows, to wit:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two (92) and $\frac{5}{100}$ feet, more or less, to the northeast corner of Marchessault

street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street forty-six (46) and $\frac{40}{100}$ feet to northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five ($95\frac{90}{100}$) and $\frac{90}{100}$ feet to southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning.

II.

That there is constructed upon said lot of land a building numbered as follows: Numbers 501, 503, 507, 507½, and 509 Lower Main or Main street, numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3, junction of Main or Marchessault streets.

III.

59 That plaintiffs are informed and believe, and on such information and belief allege the fact to be, that at all the times hereinafter mentioned the said defendant, F. C. Howes, had entered into a contract with said W. E. Lane, under and by the terms of which the said W. E. Lane was to construct and erect for defendant, F. C. Howes, that certain building aforesaid, situated on said described land.

IV.

That, as plaintiffs are informed and believe, and on their information and belief aver, said contract was never reduced to writing nor subscribed by the parties thereto or either of them, and that said contract was not nor was there any memorandum thereof filed in the office of the county recorder of said county of Los Angeles, either before the construction of said building or the work thereon was commenced or at any other times, and that the amount agreed to be paid thereunder by the said defendant Howes to the said defendant Lane exceeded the sum of one thousand ($1,000) dollars.

V.

That on or about the first day of February, 1888, said defendant,
W. E. Lane, was engaged in erecting the aforesaid building
60 for the said defendant, F. C. Howes, and as his agent, and was the person in charge of the construction thereof.

VI.

That at the last-mentioned time the said W. E. Lane, while acting under and in pursuance of his aforesaid contract with the said defendant Howes, and then and there being the agent of the said Howes and authorized thereto, did make and enter into contract with plaintiffs, whereby said plaintiffs undertook and agreed to furnish, supply, put into, and affix in and upon said building two hundred and forty-six feet of galvanized-iron cornice, and for which the said W. E. Lane then and there undertook, promised, and agreed

to pay to plaintiffs the sum of seventy-five cents per foot in U. S. gold coin as soon as the said labor should be performed and material aforesaid furnished.

VII.

That in pursuance of said contract and agreement the said plaintiffs did, between the 1st day of February, 1888, and the 5th day of March, 1888, furnish two hundred and forty-six feet of galvanized-iron cornice to be used upon said building, and the same was actually used in the construction of said building, and did put in, upon, and affix the same to said building in the construction of
61 said building under and by the direction of the said defendant, W. E. Lane, and of which defendant, F. C. Howes, had full knowledge.

VIII.

That the said material so furnished and the labor so performed as aforesaid in the construction of said building was of the actual value of one hundred eighty-four and $\frac{50}{100}$ dollars.

IX.

And it was also understood and agreed by and between said plaintiffs and W. E. Lane the said sum should be paid in U. S. gold coin; that no part of the same has been paid.

X.

That the said building was completed on the 6th day of March, 1888.

XI.

That on a certain day, the 8th day of March, 1888, and within thirty days after the completion of the building aforesaid, said plaintiffs duly filed and recorded with the county recorder of the county of Los Angeles, being the county in which such property is situated, their claim, duly verified by the oath of Chas. J. Maitre, one of the firm of Maitre & Manson, plaintiffs herein, con-
62 taining a statement of their said demand after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person who employed them, with a statement of the terms, time given, and conditions of their said contract with said Lane under which they were to and did perform said labor and furnish said materials, and also a description of the property sought to be charged with the plaintiffs' lien sufficient for identification; that said plaintiffs have paid $6.90 as a necessary charge and expense in preferring and recording said lien, viz., $1.90 for recording and $5.00 for preferring the same.

XII.

That the whole of the lot of land hereinbefore particularly de-

scribed is required for the convenient use and occupation of said building; and for further and separate cause of action plaintiffs allege—

I.

That the defendant, F. C. Howes, is and at all times hereinafter mentioned was the owner and reputed owner of all the land and premises situated in the city and county of Los Angeles, State of California, and described as follows, to wit:

63 Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two (92) and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street forty-six (46) and $\frac{40}{100}$ feet to northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five (95.90) and $\frac{90}{100}$ feet to southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning.

That there is constructed upon said lot of land a building which is numbered as follows: Numbers 501, 503, 507, 507½, and 509 Lower Main or Main street; numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3 junction of Main or Marchessault streets.

II.

The plaintiffs are informed and believe, and on such information and belief allege the fact to be, that at all the times hereinafter mentioned, the said defendant, F. C. Howes, had entered into a contract with said W. E. Lane under and by the terms of which the said

64 W. E. Lane was to construct and erect for defendant Howes that certain building aforesaid situated on said described land.

III.

That, as plaintiffs are informed and believe and on their information and belief aver, said contract was never reduced to writing nor subscribed by the parties thereto or either of them, and that said contract was not, nor was any memorandum thereof, filed in the office of the county recorder of said county of Los Angeles either before the construction of said building or the work thereon was commenced or at any other times, and that the amount agreed to be paid thereunder by the said defendant Howes to the said defendant Lane exceeded the sum of one thousand (1,000) dollars.

IV.

That on or about the 18th day of February, A. D. 1888, said defendant, W. E. Lane, was engaged in erecting the aforesaid building for the said defendant, F. C. Howes, *and* his agent, and was the person in charge of the construction thereof.

V.

65 That at the last-mentioned time the said W. E. Lane, while acting under and in pursuance of his aforesaid contract with the said defendant Howes, and then and there being the agent of the said Howes and authorized thereto, did make and enter into a contract with these plaintiffs, whereby plaintiffs undertook and agreed to furnish, supply, put into, and affix in and upon said building two hundred and forty-six (246) feet of galvanized-iron cornice to be used in and the same was actually used in the construction of said building, and whereby the said W. E. Lane then and there undertook and promised to pay plaintiffs the sum of seventy-five cents per foot for said iron cornice as soon as the said labor should be performed and the material aforesaid furnished.

VI.

That in pursuance of said contract and agreement the said plaintiffs did, between the 18th day of February, 1888, and the 5th day of March, 1888, furnish the said two hundred and forty-six feet of galvanized-iron cornice to be used in the construction of said building as aforesaid, and did put in, upon, and affix the same to said building in the construction of said building under and by the directions of the said defendant, W. E. Lane, and of which defendant, F. C. Howes, had full knowledge.

66 VII.

That the said material so furnished and the labor so performed as aforesaid in the construction of said building by the terms of said contract is of the actual value of one hundred and eighty-four and $\frac{50}{100}$ dollars, and it was also understood and agreed by and between said plaintiffs and said W. E. Lane the said sum should be paid in U. S. gold coin, and that the same is so payable; that no part of the same has been paid.

VIII.

That on the 6th day of March, 1888, said building was completed.

IX.

That on a certain day, to wit, the 5th day of April, 1888, and within thirty days after the completion of the building aforesaid, said plaintiffs duly filed and recorded with the county recorder of the county of Los Angeles, being the county in which such property is situate, their claim, duly verified by the oath of Henry C. Hanson, one of the firm of Maitre & Hanson, containing a statement of their demand after deducting all just credits and offsets, with the name of the owner and reputed owner, and also the name of the person who employed them, with a statement of the
67 terms, time given, and conditions of their said contract with the said Lane under which they were to and did perform said labor and furnish said materials, and also a description of the

property sought to be charged with the plaintiffs' lien sufficient for the identification of said property. The said plaintiffs have paid $6.90 as a necessary charge and expense in preferring and recording said lien, viz., $1.90 for recording and $5.00 for preferring the same.

X.

That no part of the said sum of one hundred and eighty-four and $\frac{50}{100}$ dollars ($184.50) has been paid, and the same is now wholly due and payable from defendants to plaintiff; that the sum of $50 is a reasonable sum for attorney's fees in prosecuting this suit in the superior court.

That the whole of the lot of land hereinbefore particularly described is required for the convenient use and occupation of said building; that said defendant Lane has been, by the decree of said court duly made and entered in the case of W. E. Lane, insolvent, *vs.* his creditors, adjudged insolvent, and the defendant, F. W. Dearborn, has been, by decree of said court in said insolvency proceedings duly given and made and entered, appointed assignee of said insolvent and duly qualified as such.

68 Wherefore plaintiff prays judgment for the sum of $241.40, and the same be adjudged a lien against the lot of land above described.

That said premises, building, and appurtenances above described, to the extent of the interest of said defendants therein, be adjudged and decreed to be sold by the sheriff of said Los Angeles county according to law and the practice of this court, and that the proceeds of such sale be applied to the payment of the costs of these proceedings and sale and reasonable attorney's fees of fifty dollars and said plaintiff's claim, amounting to said sum of $184.50, and also for the claim of any other lienholders, if any such there be, on said property who shall come in and be duly made parties to this action, and for costs of suit.

That plaintiff be allowed a reasonable sum for attorney's fees by said court and his costs in preferring and recording said lien.

That plaintiff or any other parties to this suit may become purchasers at such sale.

That such plaintiff may have such other and further order and relief in the premises as the case may require and as to the court may seem just.

DAVIS & TAYLOR,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Filed Aug. 25, 1888.

69 In the Superior Court of Los Angeles County, State of California.

E. L. TOWER, Plaintiff,
vs.
F. C. HOWES, W. E. LANE, and F. W. DEARBORN, Assignee in Insolvency of W. E. Lane, Defendants. } Complaint.

The plaintiff complains and for cause of action alleges—

I.

That heretofore, to wit, on or about the 15th day of December, A. D. 1887, at the city of and county of Los Angeles, State of California, said plaintiff was employed by the defendant, W. E. Lane, contractor and agent of F. C. Howes, as such contractor and agent to furnish labor and materials, to wit, paint, oil, and glass for the glazing and other material required for glazing and of labor done and performed in painting and glazing, to be used and which actually were used in the construction and completion of that
70 certain building or structure now upon that certain lot or parcel of land, situate in the city and county of Los Angeles, sought to be charged with this lien, described as follows, to wit: Being situated between the extension of Main street and Upper Main street at the junction thereof with the plaza and being bounded on the east by the extension of Main street and on the west by Upper Main street, on the south by the plaza, and extending northerly from the Plaza — feet to the property of —— ——.

II.

That said land was at the time of the commencement of work on said contract made by plaintiff with said Lane for the labor and material aforesaid, to wit, on or about the 15th day of December, A. D. 1887, and until the notice of lien hereinafter mentioned and still is owned by said defendant, F. C. Howes, as plaintiff is informed and believes; that said building and structure was finished on or about the 28th day of February, A. D. 1888, and plaintiff's contract was finished and fully completed on the 24th day of February, A. D. 1888.

III.

That the labor and material furnished by said plaintiff for the construction of said building as aforesaid were and are of the value of seven hundred and thirty-four and $\frac{77}{100}$ dollars
71 ($734.77) in United States gold coin, including thirty-five dollars ($35) for extra work not included in the original contract. According to said contract with said Lane the said painting and materials therefor were to be furnished for three hundred and fifty-three and $\frac{50}{100}$ dollars ($353.50) and the glazing for three hundred and fifty-six and $\frac{27}{100}$ dollars ($356.27), and extra work which could not be determined at the date of contract was to be paid for upon the com-

pletion of the contract in United States gold coin, and became due and was payable from defendant Lane to plaintiff on the 24th day of February, A. D. 1888, but the same has not been paid, nor any part thereof, except the sum of three hundred dollars ($300), leaving a balance still due and owing to plaintiff of four hundred and thirty-four and $\frac{77}{100}$ dollars ($434.77).

IV.

That on a certain day, to wit, the 22nd day of March, A. D. 1888, said plaintiff duly filed with the county recorder of Los Angeles county, being the county in which said property is situated, his claim, duly verified by the oath of E. L. Tower, containing a statement of plaintiff's demands after deducting all just credits and offsets, with the name of the owner and reputed owner of said premises, and also the name of the person by whom plaintiff was
72 employed, with a statement of the terms, time given, and conditions of said contract, and also a description of the property sought to be charged with the lien sufficient for identification, which claim of lien was duly recorded in Book 5, page 82, of Mechanics' Liens.

V.

That plaintiff paid seven and $\frac{15}{100}$ dollars ($7.15) as a necessary charge and expense in preparing and recording said lien, viz., two and $\frac{15}{100}$ dollars ($2.15) for recording and verifying said lien and five dollars ($5) for preparing the same.

VI.

That the sum of one hundred and fifty dollars ($150) is a reasonable sum for attorney's fees in prosecuting this suit in the superior court.

VII.

That there is now due and owing by the defendant, F. C. Howes, to the contractors on the contract for the construction of said building, as plaintiff is informed and believes, upwards of $1,000.

VIII.

That the contract under which the first story of said build-
73 ing was erected and constructed, made between defendants Howes and Lane, was not filed in the office of the county recorder of said county before the commencement of the work on said building or at all, as plaintiff is informed and believes; that the contract for the second story of said building, made by said Howes with said Lane, was recorded, as plaintiff is informed and believes, after the commencement of the work under said contract, and that there is now due and owing from defendant, F. C. Howes, to defendant Lane or his assignee a sum of more than $1,000.

IX.

That the said land upon which the said building was constructed and the whole thereof is necessary for the convenient use and occupation of said building.

X.

That the said Lane has been, by the decree of this court duly made and entered on the 6th day of March, A. D. 1888, adjudged insolvent, and the defendant, F. W. Dearborn, has been, by decree of said court in said insolvency proceeding duly given, made, and entered on the 7th day of April, A. D. 1888, appointed assignee of said insolvent and duly qualified as such, and ever since has been and still is the duly qualified and acting assignee of said insolvent.

74 Wherefore the plaintiff prays for judgment against said F. C. Howes for the sum of four hundred and thirty-four and $\frac{77}{100}$ dollars ($434.77) and the further sum of seven and $\frac{15}{100}$ dollars ($7.15) for preparing and recording said lien and the sum of one hundred and fifty dollars ($150) attorney's fees and costs of this suit, and that the same be adjudged a lien against the lot of land and premises above described; that said land and premises may be sold under the order and decree of this court and the proceeds thereof be applied to the payment of the sum found due plaintiff and costs and attorney's fees, and that the plaintiff have execution against said defendant, F. W. Dearborn, assignee of W. E. Lane, for any deficiency to be paid out of the money in his hands applicable thereto, and for other and further relief.

BARCLAY, WILSON & CARPENTER,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Filed June 13th, 1888.

75 In the Superior Court of the County of Los Angeles and State of California.

THE CALIFORNIA DOOR CO., a Corporation, Plaintiff,
vs.
F. C. HOWES, W. E. LANE, and F. W. DEARBORN, Assignee in Insolvency of the Estate of W. E. Lane, Defendants. } Complaint.

I.

The plaintiff complains and alleges that plaintiff is and was at all the times hereinafter mentioned a corporation duly organized and existing under the laws of the State of California and a dealer in doors, sashes, blinds, and builders' materials, with its principal place of business in the city and county of San Francisco, in said State, and that a copy of the copy of its articles of incorporation filed in the office of the secretary of state of said State of California,

duly certified by such secretary of state, has been filed in the office of the county clerk of the county of Los Angeles, State of California.

II.

76 That the said defendant, F. C. Howes, is and at all times herein mentioned was the owner and reputed owner of the following-described land and premises, situate in the city of Los Angeles, in the county of Los Angeles and State of California, to wit: Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south twenty-three deg. 21 min. west along the east line of Upper Main street 92.51 feet, more or less, to the northeast corner of Marchessault street and Upper Main street; thence south 49 deg. 30 min. east along Marchessault street 46.40 feet to northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street 95.99 feet to the southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west, 68.21 feet along the line of said Amestoy to the place of beginning.

III.

That on or about the — day of November, 1887, the defendant, F. C. Howes, entered into a contract with defendant, W. E. Lane, whereby said W. E. Lane agreed to construct and complete
77 a certain brick building upon the land above described for said F. C. Howes, which said F. C. Howes agreed to pay said W. E. Lane a sum in excess of one thousand dollars, and thereafter, on or about the — day of November, 1887, in pursuance of said contract and with the knowledge and consent of said F. C. Howes, said W. E. Lane commenced the erection and construction of said building, and said building was finished and completed on the 16th day of March, 1888.

IV.

That said contract or any contract or any memorandum thereof setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, was not filed in the office of the county recorder of the county of Los Angeles and State of California, which is the county where said property is situate, before said work on said building was commenced or at all.

V.

That on January 31st, 1888, said W. E. Lane, the contractor
78 and agent of said owner, F. C. Howes, as such contractor and agent of said owner entered into a contract with the said The California Door Co., under and by which the said The California

Door Co. was to furnish doors, sashes, blinds, and materials to be used in the construction of the building upon the said land hereinbefore described, and the said The California Door Co. was to receive from the said W. E. Lane, as such contractor and agent, upon the delivery of the materials of the kinds aforesaid, their value in cash, on demand, in gold coin of the United States.

VI.

That said contract has been fully performed on the part of the said The California Door Co., and doors, sashes, blinds, and materials were furnished by the said corporation to be used in the construction of and which actually were used in the construction of said building.

That said last-mentioned contract was completed on the 21st day of February, 1888, and the said doors, sashes, blinds, and materials so furnished were of the value of three hundred and three dollars and seven cents ($303.07), according to said contract between said corporation and said W. E. Lane, and were reasonably worth said sum, which sum became due, owing, and payable therefor (under said contract last named) to plaintiff on the 21st day of Feb-
79 ruary, 1888, and the same has not been paid nor any part thereof.

VII.

That on the 17th day of March, 1888, said plaintiff duly filed for record with the county recorder of the county of Los Angeles, being the county in which said property is situate, and within thirty days after the completion of said building, its claim of lien, duly verified by the oath of F. W. Dearborn, the agent of said plaintiff and the manager of its branch store in the city of Los Angeles, in said county and State, containing a statement of plaintiff's demand, after deducting all just credits and offsets, with the name of the owner and reputed owner of said land and premises, and also the name of the person by whom it was employed and to whom it furnished the materials, with a statement of the terms, time given, and conditions of its contract, and also a description of the property to be charged with the lien, sufficient for identification.

VIII.

That the whole of the land hereinbefore described is necessary for the convenient use and occupation of said building.

IX.

80 That on the 6th day of March, 1888, the said W. E. Lane filed his petition in insolvency in this court, and thereupon was duly adjudged insolvent by said court, and the defendant, F. W. Dearborn, was duly appointed the assignee of the estate of said insolvent by said court on the 7th day of April, 1888, and said Dearborn thereafter duly qualified as such assignee and he became and still is the duly qualified and acting assignee of the estate of said insolvent.

X.

That the plaintiff has paid the sum of $1.65 for recording said claim of lien, and the further sum of $10 for preparing the same, making a total of $11.65, which said total sum was a necessary charge and expense for preparing and recording said claim of lien.

XI.

That one hundred and fifty dollars is a reasonable attorney's fee to be allowed to the plaintiff in this action.

Wherefore plaintiff prays for judgment against said F. C. Howes for the sum of three hundred and three dollars and seven cents ($303.07), and the further sum of eleven dollars and sixty-five cents for preparing and recording said lien, and the sum of one hundred and fifty dollars attorney's fees and costs of this suit, and that
81 the same be adjudged a lien against the land and premises hereinbefore described, and that said land and premises may be sold under the order and decree of this court, and the proceeds thereof be applied to the payment of the sum found due to the plaintiff and costs and attorney's fees, and that plaintiff have execution against said defendant, F. W. Dearborn, as assignee of the estate of said W. E. Lane, for any deficiency, and for such other and further relief as to the court may seem just.

ADAMS & RHODES,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Filed June 15, 1888.

82 In the Superior Court of Los Angeles County, State of California.

B. A. BREAKEY, Plaintiff,
vs.
F. C. HOWES, Defendant. } No. 8068. Complaint.

The plaintiff complains of defendant and for cause of action alleges:

First. That plaintiff is and was a resident merchant and dealer in hardware, in the city of Los Angeles, Cal., at all the times set forth a... ...d in this complaint.

Second. That at all the times hereinafter mentioned the defendant, F. C. Howes, was and he still is the owner and in the possession of certain real estate situated in the city and county of Los Angeles, State of California, and described as follows, to wit: The lot on the junction of Main and Upper Main streets, commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south 23 deg. 21 min. west along the east line
83 of Upper Main street ninety-two and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault street and Upper Main

street; thence south 49 deg. 30 min. east along Marchessault street forty-six and $\frac{49}{100}$ chains to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said line of Main street ninety-five and $\frac{99}{100}$ feet to southeast corner of lot owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning.

Third. That on or about the 7th day of November, 1887, and from that time until the 5th day of March, 1888, one W. E. Lane, with the knowledge and consent and by the direction of said defendant, F. C. Howes, erected and constructed a certain building on the said real estate.

That on the 7th day of November, 1887, the plaintiff and the said W. E. Lane, as agent of the defendant Howes, agreed that the said plaintiff should furnish certain hardware to be used in the construction of said building, to be paid for in cash, on delivery, by said defendant Howes; that in pursuance of the said contract and prior to March 5th, 1888, plaintiff furnished hardware for the said building, as stated in annexed bill of items, and which was actually used in said building and constitutes now a part thereof, and
84 of the value of $80.65, and which is a fair and reasonable value thereof; that the said defendant Howes has failed and refused to pay the same to the plaintiff or any part thereof, and the said sum is due and remains fully unpaid.

That no contract for the erection of said building between the said Lane and the said defendant was ever filed or recorded in the office of the county recorder of said county; that said building was completed on or about the 5th day of March, 1888, and, within thirty days after the completion of said building, that on the 24th day of March, 1888, the plaintiff filed for record in the office of the county recorder of said county, that being the county in which said property is situated, a claim and notice of lien, containing a statement of his said demand, after deducting all just credits and offsets, with the name of said F. C. Howes as the owner of said real estate and the name of said W. E. Lane as the person to whom he furnished said hardware for and on account of said defendant, and a statement of the terms, time given, and conditions of the contract by which the same was furnished, being the terms, time given, and conditions hereinbefore set forth, and claiming a lien on said premises for the said amount of money and describing the property to be charged with said lien as the same is described in this complaint, which claim was verified by the plaintiff's oath and was recorded in the
85 office of the said recorder, in Book 5, page 97, of Mechanics' Liens.

That the said land upon which the said building is constructed, together with the entrance thereto, is necessary for the convenient use of said building.

That plaintiff, after diligent search, has not been able to ascertain that there are other lienholders on said premises subsequent to the plaintiff's lien.

That plaintiff did give due and timely notice to defendant that he had furnished said material for the construction of said building,

and defendant promised and agreed to pay the same on terms hereinbefore stated.

That plaintiff has paid $14.75 as a necessary charge and expense in preferring and recording said lien and $8.00 for searches of records of titles and other liens on said premises.

That seventy-five dollars is a reasonable sum for attorney's fees in prosecuting this suit in the superior court of Los Angeles county, Cal.

Wherefore plaintiff asks judgment for the said sum of $80.65 and interest from March 6th, 1888, and that the same be adjudged a lien against the lot of land and premises above described and the use of said building and structure thereon; that the premises, building, and appurtenances above described, to the extent of the interest of said defendant therein, be adjudged and decreed to be sold by the sheriff of
86 said Los Angeles county, according to law and the practice of this court, and that the proceeds of such sale be applied to the payment of the costs of these proceedings and sale and reasonable attorneys' fees—say, $75.00—and said claim, amounting to $80.65 and interest, and also for the claim of any other lienholders, if any such there be, on said premises and property who shall come in and be duly made parties to this action, and for plaintiff's disbursements: that plaintiff be allowed a reasonable attorney's fee by said court, and his costs and disbursements in preparing and recording said lien, and for costs in this action.

That plaintiff or any other party to this suit may become purchasers at such sale.

That plaintiff may have such other and further relief and order in the premises as to the court may seem just.

REYMERT, ORFILA & REYMERT,
Plaintiff's Attorneys.

(Duly verified.)

Endorsed: Filed.

87 In the Superior Court in and for Los Angeles County, State of California.

A. H. PARSONS, Plaintiff,
vs.
F. C. HOWES, W. E. LANE, and F. W. DEARBORN, Assignee in Insolvency of W. E. Lane, an Insolvent Debtor, Defendants.

No. 8094.
Complaint.

Plaintiff complains and alleges:

I.

That on the 6th day of March, A. D. 1888, in the matter of W. E. Lane, an insolvent debtor, an order was duly made by this court declaring and adjudging the said W. E. Lane insolvent and to be an insolvent debtor; that thereafter such proceedings were had that on the 7th day of April, A. D. 1888, the above-named F. W. Dearborn

was duly elected and appointed assignee of the estate of said W. E. Lane, insolvent; that he thereafter qualified as such assignee, and he ever since has been and now is the duly elected, appointed, and qualified assignee in insolvency of said W. E. Lane, insolvent debtor.

88 II.

That during all the times hereinafter mentioned the defendant, F. C. Howes, was and is now the owner and the reputed owner of that lot or parcel of land located and being in the city and county of Los Angeles, State of California, *in* the junction of Upper Main and Main streets extension, and bounded on the west by Upper Main St., on the south by the plaza or Marchessault St., east by Main St. extension, and on the north by a one-story brick building said lot being more particularly described as follows, to wit: Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy, and running thence south twenty-three deg. 21 min. west along the east line of Upper Main street 92.51 feet, more or less, to the northeast corner of Marchessault and Upper Main streets; thence south 49 deg. 30 min. east along Marchessault street 46.40 feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east along said west line of Main street 95.99 feet to the southeast corner of lot owned by said Amestoy; thence west 55 deg. 48 min. west 68.21 feet along line of said Amestoy to place of beginning, together with the appurtenances thereto.

89 That there is now constructed and situate upon said lot of land a certain building or structure which is known and described as follows: Numbers 501, 503, 507, 507½, and 509 Lower Main street or Main street; numbers 2, 4, 6, 8, and 10 Upper Main street, and numbers 1, 2, and 3 at the junction of Main and Marchessault streets; that all the above-described land is necessary for the proper use and occupation of said building.

III.

The plaintiff is informed and believes and therefore alleges that prior to the 17th day of December, A. D. 1887, defendant Howes entered into a contract with defendant Lane for the erection, construction, and completion of that certain building or structure above described, and the amount to be paid thereunder was a greater sum than $1,000, and that previous to the commencement of work upon said building by said Lane said contract or a memorandum thereof was not nor has either since been filed in the office of the county recorder of said county.

IV.

That on the 17th day of December, A. D. 1887, plaintiff entered into a written contract with defendant Lane, who as con-
90 tractor had charge previous to that date and subsequent thereto of the construction of said building, and as such con-

tractor was the duly authorized agent of said Howes; and said contract is in words and figures as follows, to wit:

"Articles of agreement made this seventeenth day of December, one thousand eight hundred and eighty-seven, between W. E. Lane, of the city and county Los Angeles, State of California, the party of the first part, and A. H. Parsons, of the city and county Los Angeles, State aforesaid, the party of the second part.

"First. The said party of the second part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the first part, his executors, administrators, and assigns, that he, the said party of the second part, his executors, administrators, and assigns, shall and will, for the consideration hereinafter mentioned, on or before the —— —, well and truly and substantially do and finish all the lathing and plastering on block situated *on* the junction of Main and Upper Main streets, in the city and county Los Angeles, State of California, conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties and hereunto annexed, within the time aforesaid, in a good, workmanlike, and sub-
91 stantial manner, to the satisfaction and under the direction of the said R. B. Young, architect, to be testified by a writing or certificate under the hand of the said —— ——, and also shall and will find and provide such good, proper, and sufficient materials of all kinds whatsoever as shall be proper and sufficient for completing and finishing all the lathing and plastering and other work of said building mentioned in the plans and specifications for the sum of one thousand three hundred and thirty-five dollars ($1,335.00); and the said party of the first part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the second part, his executors and administrators, that he, the said W. E. Lane, the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the party of the second part, his executors, administrators, or assigns, the said sum of one thousand three hundred and thirty-five dollars, lawful money of the United States of America, in the manner following: 75 per cent. of contract price to be paid in installments during the progress of the work, payments to be made on the first and third Saturdays
92 of each month, and no payment shall exceed the cost of material and labor used and employed in the execution of said work to the satisfaction of the said party of the first part; and it is further agreed that the said party of the second part furnish to the said party of the first part receipts for all material and labor employed on said building; the last and final payment to be made 30 days after completion of work, provided that in each of said cases a certificate be obtained and signed by the said —— ——.

"And it is hereby further agreed by and between the said parties—

"First. The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings to the true meaning and intention of the said drawings and specifications.

"Second. The contractor, at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding, implements, molds, models, and cartage of every description for the due performance of the several erections.

"Third. Should the owner at any time during the progress of said building request any alterations, deviations, additions,
93 or omissions from the said contract, specifications, or plans he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.

"Fourth. Should the contractor at any time during the progress of said works refuse or neglect to supply a sufficiency of material or workmen the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the expenses shall be deducted from the amount of the said contract price.

"Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications the same shall be decided by R. B. Young, architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or works omitted the same shall be valued by two competent persons, one employed by the owner and the other by the contractor, and in case they cannot agree these two shall have power to name an umpire, whose decision shall be binding on all parties.

"Sixth. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works or any part or parts thereof, respectively, or
94 for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

"Seventh. The said party of the second part further undertakes and agrees that he will pay and hold the party of the first part free and harmless from all loss or damages suffered by any person in any manner by reason of any accidents occurring in connection with the work herein undertaken or occasioned by the carelessness of the party of the second part or any one in his employ.

"In witness whereof the said parties to these presents have set their hands and seals the day and year first above written.

"Signed, sealed, and delivered in the presence of—

W. E. LANE. [SEAL.]
A. H. PARSONS. [SEAL.]"

V.

That the plaintiff, between the 17th day of December, A. D. 1887, and the first day of March, A. D. 1888, in pursuance of the terms and conditions of the said contract, performed labor on and furnished materials to be used in and said materials were used in the construction of said building to the value of the sum of
95 one thousand three hundred and thirty-five dollars ($1,335.00) in lawful money of the United States, and that the sum of one thousand sixty-eight and $\frac{23}{100}$ dollars ($1,068.23) has been paid on account of said labor and materials, and that there is still due and unpaid thereon the sum of two hundred sixty-six and $\frac{77}{100}$ dollars ($266.77).

VI.

That said building was completed on or about the first day of March, A. D. 1888, and that on the 29th day of March, A. D. 1888, the plaintiff filed with the county recorder of said Los Angeles county his claim, duly verified by said plaintiff, containing a statement of his demands after deducting all just credits and offsets, with the name of said Howes as owner and reputed owner, and also the name of said Lane, with whom plaintiff entered into the above contract, together with a statement of the terms, time given, and conditions of said contract with said Lane, and also a description of said property sufficient for identification, which said claim was duly recorded in Book 15, page 107, Mechanics' Liens, records of said Los Angeles county, on the 29th day of March, A. D. 1888.

VII.

96 That the plaintiff has expended the sum of $6.90 in preparing, verifying, and recording said lien.

VIII.

That the sum of one hundred dollars ($100) is a reasonable sum to be allowed plaintiff for attorney's fees in foreclosing this lien.

IX.

That the plaintiff is informed and believes there was due at the time of filing plaintiff's lien and is still due from defendant Howes to said Lane the sum of eight hundred and fifty dollars ($850), lawful money of the United States.

Therefore plaintiff demands judgment against defendants—

1st. In the sum of three hundred seventy-three $\frac{67}{100}$ dollars ($373.67), being the aggregate of the above-named sums.

2nd. In that the plaintiff may be adjudged to have a lien on the above-described property for the said sum of three hundred seventy-three $\frac{67}{100}$ dollars ($373.67) and for costs of suit.

3rd. That the said property may be sold according to law, and that the proceeds be applied to the payment of the above-mentioned sum and to the costs of said sale and of this suit.

97 4th. And for such further and equitable relief as may be fitting and proper.

SCARBOROUGH & WATERMAN AND
BARCLAY, WILSON & CARPENTER.

Duly verified.

Endorsed: Filed June 27, 1888.

NOTE.—The answers in all of the consolidated cases, being identical, *mutatis mutandis*, with that in the Kellogg case as above, are omitted.

98 In the Superior Court of the County of Los Angeles, *County* State of California.

LEVI M. KELLOGG *vs.* F. C. HOWES.	No. 7840.
THE WILLAMETTE STEAM MILLS, LUMBERING, AND MANUFACTURING CO. *vs.* F. C. HOWES.	No. 7868.
MAITRE & HANSEN *vs.* F. C. HOWES.	No. 7880.
E. L. TOWER *vs.* F. C. HOWES.	No. 7980.
CALIFORNIA DOOR CO. *vs.* F. C. HOWES.	No. 8003.
B. A. BREAKEY *vs.* F. C. HOWES.	No. 8068.
A. H. PARSONS *vs.* F. C. HOWES.	No. 8094.

Findings and Decision.

On this 15th day of February, 1889, these causes came on regularly for trial before the court, sitting without a jury, no jury having been demanded by either party thereto, and thereupon it was ordered by the court that the said causes should be consolidated and tried together, all parties consenting thereto. Messrs. Davis & Taylor appeared as attorneys for the plaintiffs, Levi M. Kellogg and Maitre & Hansen; Messrs. Johnston & Borden for the plaintiff, The Willamette Steam Mills, Lumbering, & Manufacturing Co.; Messrs.

Barclay, Wilson & Carpenter, for the plaintiff, E. L. Tower;
99 Messrs. Reymert, Orfila & Reymert for the plaintiff, B. A. Breakey, and Messrs. Scarborough & Waterman, for the plaintiff, A. H. Parsons, and Messrs. Haynes & Mitchell appeared as attorneys for the defendant, F. C. Howes, and the court having heard the proofs of the respective parties and considered the same, the records and papers in the case and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

That defendant, F. C. Howes, is and at all the times mentioned in the complaints in said several actions was the owner and seized in fee of all the certain real property described in the complaints, and that the building described in the complaints as having been erected on said real property was erected and constructed thereon with the knowledge and consent of said defendant Howes.

That on the 12th day of September, 1887, and on the 31st day of October, 1887, the defendant, F. C. Howes, and W. E. Lane entered into contracts in writing, copies of which are annexed to the answers herein, whereby said W. E. Lane agreed and contracted to erect and construct said building on said land for the price or sum of $6,625.00.

That the price agreed upon in said contract for the erection and construction of said building exceeded the sum of $1,000;
100 that said contracts were in writing, but the same were not, nor were any memoranda thereof, filed in the office of the county recorder of Los Angeles county before the work on said building was begun or at any time thereafter.

That the several plaintiffs in these cases afterwards entered into the contracts with the said W. E. Lane mentioned and declared upon in their respective complaints, and in compliance with the terms of such contracts furnished to the said Lane the materials and performed the labor in their several complaints mentioned, which said labor was performed upon the said building and which material was furnished for and actually used in the erection thereof, and that there is now due to the plaintiffs, after deducting from the fair and reasonable value of the labor and material furnished by them respectively all proper credits and offsets, the following sums respectively—that is to say:

To Levi M. Kellogg	$965 70
" Willamette Mills, &c., Co.	2,464 55
" Maitre & Hansen	184 50
" E. L. Tower	434 77
" California Door Co.	303 07
" B. A. Breakey	80 65
" A. H. Parsons	247 07

the said sums being the reasonable value of said work and materials done and furnished by them.

101 That the said building was completed March 5th, 1888, and the several plaintiffs, within 30 days thereafter, filed in the

office of the county recorder of said Los Angeles county their claims for liens as in their complaints mentioned, which claims were in due form as required by law; that the several plaintiffs paid the following sums for filing and recording their respective liens, and the following sums are fair and reasonable attorneys' fees to be allowed them for prosecuting these cases in the superior court, viz:

Levi M. Kellogg, filing, &c.	$2 50	
" " attorney's fees	50 00	
		$52 50
Willamette, &c., Co., filing, &c.	1 90	
" " attorney's fees	100 00	
		101 90
Maitre & Hansen, filing, &c.	1 90	
" " attorney's fees	20 00	
		31 90
E. L. Tower, filing, &c.	2 15	
" " attorney's fees	25 00	
		27 15
California Door Co., filing, &c.	1 65	
" " attorney's fees	30 00	
		31 65
B. A. Breakey, filing, &c.	1 75	
" " attorney's fees	25 00	
		26 75
A. H. Parsons, filing, &c.	1 90	
" " attorney's fees	30 00	
		31 90

And as conclusions of law arising from said facts and from the facts admitted in the pleadings in the several actions, the
102 court is of the opinion and decides as follows:

First. That each of said plaintiffs is entitled to a lien on the premises described in their said several complaints for the payment to each of the said plaintiffs the said several sums so found due to each of them, with their costs and attorneys' fees in this action, as herein allowed, and to a decree for the sale of the said premises or so much thereof as may be necessary to satisfy the said several sums of money and costs.

Second. That upon such sale and after the expiration of the time allowed by law for the redemption therefrom each of said defendants and all persons claiming under them or either of them shall be forever barred and foreclosed of all equity of redemption, right, title, or interest in the said premises.

That if the moneys arising from said sale shall be insufficient to pay the amounts of the said several liens as hereinbefore found due, together with the costs and attorneys' fees and expenses of sale, the amount of said deficiency, if any, shall be docketed against F. W. Dearborn, assignee of the estate of W. E. Lane, an insolvent debtor.

WALTER VAN DYKE, *Judge.*

Dated March 8th, 1889.

Endorsed: Filed March 8th, 1889.

103 In the Superior Court of the County of Los Angeles, State of California.

LEVI M. KELLOGG *vs.* F. C. HOWES *et al.*	No. 7840.
WILLAMETTE STEAM MILLS, LUMBERING AND MANUFACTURING CO. *vs.* F. C. HOWES *et al.*	No. 7868.
MAITRE & HANSEN *vs.* F. C. HOWES.	No. 7880.
E. L. TOWER *vs.* F. C. HOWES *et al.*	No. 7980.
CALIFORNIA DOOR CO. *vs.* F. C. HOWES *et al.*	No. 8003.
B. A. BREAKEY *vs.* F. C. HOWES *et al.*	No. 8068.
A. H. PARSONS *vs.* F. C. HOWES.	No. 8094.

Judgment.

These causes having come on to be heard the — day of February, 1889, and an order having been duly made consolidating all of said causes, and the court proceeding to the trial thereof upon the complaints and answers filed in the several causes, sitting without a jury (no jury having been demanded by any of the parties), whereupon witnesses upon the part of plaintiffs and defendant, F. C.
104 Howes (the defendant, F. W. Dearborn, assignee of W. E. Lane, an insolvent debtor, having suffered default and his default having been entered herein), were duly sworn and examined, and documentary evidence introduced by respective parties; and, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court files its findings and decision in writing and orders that judgment be entered herein in favor of the said several plaintiffs in accordance therewith.

And whereas in said findings and decision the court found and decided that the said several plaintiffs are and each of them is entitled to have a lien upon the building and premises described in

their said several complaints (and hereinafter described) for the specific sums set forth in said findings (and hereinafter mentioned), together with their attorneys' fees and costs:

Now, therefore, on motion of the attorneys for said several plaintiffs, it is ordered, adjudged, and decreed that all and singular the said building and premises mentioned in said complaints and hereinafter described, or so much thereof as may be sufficient to raise the amounts due to the plaintiffs, as hereinafter particularly set forth, together with costs and expenses of sale, and which may be
105 sold separately without material injury to the parties interested, be sold at public auction by the sheriff of Los Angeles county, in the manner prescribed by law and according to the course and practice of this court, and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchasers of the said building and premises on the said sale.

That the said sheriff out of the proceeds of said sale retain his fees, disbursements, and commissions on said sale, and pay to the said several plaintiffs or their attorneys out of said proceeds the following sums of costs, attorneys' fees, and principal found due as aforesaid, as set opposite the names of each of said plaintiffs, to wit:

To Levi M. Kellogg, costs:	
Filing lien, &c.	$2 50
Attorney's fees	50 00
Principal	965 70
Total	
To Willamette Steam Mills, &c., Co., costs:	
Filing lien, &c.	1 90
Attorney's fees	100 00
Principal	2,464 55
Total	
To Maitre & Hansen, costs:	
Filing lien, &c.	1 90
106 Attorney's fees	30 00
Principal	184 50
Total	
To E. L. Tower, costs:	
Filing lien, &c.	2 15
Attorney's fees	25 00
Principal	434 77
Total	
To California Door Co., costs:	
Filing lien, &c.	1 65
Attorney's fees	30 00
Principal	303 07
Total	

To B. A. Breakey, costs:

Filing lien, &c.	1 75
Attorney's fees	25 00
Principal	80 65
Total	

To A. H. Parsons, costs:

Filing lien, &c.	1 90
Attorney's fees	30 00
Principal	247 07
Total	

together with interest thereon, at the rate of seven per cent. per annum, from the date of this decree, all in gold coin of the
107 United States, or so much thereof as the said proceeds will pay of the same.

That the defendants and all persons claiming from or under them, and all persons having liens subsequent to the said liens of plaintiffs by judgment or decree upon the land and premises therein described, and all persons having any claim or lien by or under such subsequent judgment or decree, and their heirs or personal representatives, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said land and premises and every part and parcel thereof from and after the delivery of said sheriff's deed.

And it is further adjudged and decreed that the purchaser or purchasers of such mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof.

And it is further adjudged and decreed that if the moneys arising from the said sale shall be insufficient to pay the amounts so found due to the plaintiffs, as above stated, with interest and costs
108 and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiff in his return of said sale, and that on the coming in and filing of said return the clerk of this court docket a judgment for such balance against F. W. Dearborn, assignee of W. E. Lane, an insolvent debtor (as such assignee and not otherwise), and that said assignee pay the said plaintiffs the amount of such deficiency and judgment, with interest thereon, at the rate of seven per cent. per annum, from the date of said last-mentioned return and judgment, and that the plaintiffs have execution therefor.

The lands and premises directed to be sold by this decree are situated, lying, and being in the city and in the county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

Commencing at a point on the east line of Upper Main street, being the southwest corner of a brick building now or formerly owned by Domingo Amestoy and running thence south 23 deg. 21 min. west along the east line of Upper Main street ninety-two and $\frac{51}{100}$ feet, more or less, to the northeast corner of Marchessault and Upper Main streets; thence south 49 deg. 30 min. east along Marchessault street forty-six and $\frac{40}{100}$ feet to the northwest corner of Main and Marchessault streets; thence north 37 deg. east
109 along said line of Main street ninety-five and $\frac{99}{100}$ feet to the southeast corner of lot now or formerly owned by said Amestoy, and thence north 55 deg. 48 min. west sixty-eight and $\frac{21}{100}$ feet along line of said Amestoy to place of beginning—

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

Done in open court the 8th day of March, 1889.

WALTER VAN DYKE,
Judge Superior Court.

(Entered March 8th, 1889.)

110 In the Superior Court of the County of Los Angeles, State of California.

LEVI M. KELLOGG *vs.* F. C. HOWES.	No. 7840.
WILLIMETTE STEAM MILLS, LUMBERING AND MANUFACTURING CO. *vs.* F. C. HOWES.	No. 7868.
MAITRE & HANSEN *vs.* F. C. HOWES.	No. 7880.
E. L. TOWER *vs.* F. C. HOWES.	No. 7980.
CALIFORNIA DOOR CO. *vs.* F. C. HOWES.	No. 8003.
B. A. BREAKEY *vs.* F. C. HOWES.	No. 8068.
A. H. PARSONS *vs.* F. C. HOWES.	No. 8094.

Statement.

These causes came on to be tried on the 15th day of February, 1889,

and by order of the court were consolidated and tried together, all parties being present by their respective attorneys; and thereupon the several plaintiffs, to maintain the issues on their behalf, offered evidence tending to show that they furnished the materials mentioned in their several complaints, and the fair and reasonable value thereof. They also gave in evidence their respective claims for liens filed by them in the county recorder's office, as in their complaint alleged.

The only one of said claims for liens which is material for
111 the purpose of this statement is that of Knox & Co., assignors of the plaintiff, Levi M. Kellogg, which are in words and figures following, to wit:

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

D. KNOX & Co., Consisting of D. Knox, P. R. Tipton, and D. C. Golden and A. Levering, *vs.* F. C. HOWES and W. E. LANE. } Mechanics' Lien.

Notice is hereby given that D. Knox, P. R. Tipton, D. C. Golden, and A. Levering, of the county of Los Angeles, as sub-contractors, performed labor and furnished materials actually used in the construction of that certain building or structure and now upon the certain lot and pacel of land situate in the city and county of Los Angeles, State of California, and sought to be charged with this lien, and described as follows, to wit, that certain lot and building situated at the junction of Main, Upper Main, and Lower Main streets, being bounded on the west by Upper Main, and on the east by Lower Main, and on the south by Main street, having a frontage of about 35 feet on Main, running back about 70 feet north
112 between Upper and Lower Main streets.

That F. C. Howes is the name of the owner or reputed owner of said premises and caused said building or structure to be constructed.

That W. E. Lane is the name of the contractor who, on or about the 4th day of October, 1887, as such contractor and agent of said owner, entered into a contract with said D. Knox & Co., under and by which they were to perform certain labor and furnish materials for said building, and the following is a statement of the terms, time given, and condition of said contract, to wit:

To furnish plumbing, gas-fitting, roofing supplies, and put in and on the same at the usual price and charge for such work and material.

That said contract has been fully performed on the part of said D. Knox & Co., and the same was completed and the said building or structure finished on the 5th day of March, 1888, and 30 days have not elapsed since the same was completed and said building or structure finished.

That the amount of the contract price for said labor performed and materials furnished as aforesaid is ($1,235.24) twelve hundred thirty-five and $\frac{24}{100}$ dollars, in United States gold coin.

That no sum has been paid on said contract price, and that
113 the sum of twelve hundred thirty-five and $\frac{24}{100}$ ($1,235.24) dollars, in gold coin of the United States, is still due and owing thereon to said D. Knox & Co. after deducting all just credits and offsets.

Wherefore said D. Knox & Co. claim the benefit of the law to liens of mechanics and others upon real property, to wit, chapter II, title IV, part III, of the Code of Civil Procedure.

D. KNOX & CO.,
By D. KNOX.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

D. Knox, being duly sworn, deposes and says that he is one of the persons named as sub-contractors in the foregoing claim of lien; that he has read the same and knows the contents thereof, and that the same is true, and that *the contents* (among other things) a corrected statement of their demand after deducting all just credits and offsets.

D. KNOX.

Subscribed and sworn to before me this 6th day of March, 1888.
FRANK GIBSON,
County Recorder,
By ARTHUR BRAY, *Deputy.*

Endorsed: Filed March 6, 1888.

114 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

D. KNOX & CO., Consisting of David Knox, Dowe C. Golden, Albert Levering, and Pompey R. Tipton,
vs.
F. C. HOWES and W. E. LANE.
} Mechanics' Lien.

Notice is hereby given that D. Knox & Co., of the city and county of Los Angeles, as sub-contractors, performed labor and furnished materials actually used in the construction of that certain building or structure now upon that certain lot and parcel of land situate in the city and county of Los Angeles, State of California, and sought to be charged with this lien, and described as follows, to wit:

Commencing at a point on, &c. (No question arising upon the accuracy of the description, the same is here omitted.)

That said F. C. Howes is the name of the owner and reputed owner of said premises, and caused said building or structure to be constructed.

That said W. E. Lane is the name of the contractor who, on or about the 4th day of October, 1887, as such contractor and
115 agent of said owner, entered into a contract with said D. Knox & Co., under and by which they were to perform cer-

tain labor and furnish materials for said building, and the following is a statement of the terms, time given, and condition of said contract, to wit: That said labor and materials were to be paid for in U. S. gold coin as soon as said labor was performed and materials furnished.

That said contract has been fully performed on the part of said D. Knox & Co., and the same was completed and the said building or structure was finished on or about the 5th day of March, 1888, and 30 days have not elapsed since the same was completed and said building or structure finished. The labor and materials furnished consisted of plumbing, gas, water, and sewer pipe, tin-roofing, and supplies and labor, putting the same in, on, and about said building and premises.

That the amount of the contract price for said labor performed and materials furnished as aforesaid is ($1,235.34) twelve hundred thirty-five and $\frac{34}{100}$ dollars, in United States gold coin.

That no part of said sum has been paid on said contract price, and that the sum of twelve hundred thirty-five and $\frac{34}{100}$ dollars, in gold coin of the United States, is still due and owing thereon to said D. Knox & Co. after deducting all just credits and offsets.

116 Wherefore said D. Knox & Co. claim the benefit of the law as applied to liens of mechanics and others upon real property, to wit, chapter II, title IV, part III, of the Code of Civil Procedure and amendments thereto.

D. KNOX & CO.,
By POMPEY R. TIPTON.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Pompey R. Tipton, being duly sworn, deposes and says that he is one of the persons named as sub-contractor in the foregoing claim of lien; that he has read the same and knows the contents thereof, and that the same is true, and that it contains (among other things) a corrected statement of their demand after deducting all just credits and offsets.

POMPEY R. TIPTON.

Subscribed and sworn to before me this 5th day of April, 1888.
FRANK A. GIBSON,
County Recorder.

Endorsed: Filed April 5, 1888.

Thereupon the plaintiffs rested.

And the defendant, F. C. Howes, to maintain the issue on his behalf, gave in evidence the following contracts:

117 *Articles of Agreement.*

Articles of agreement made this twelfth day of September, one thousand eight hundred and eighty-seven, between F. C. Howes, Esq., of the city and county of Los Angeles, State of California, the party of the first part, and W. E. Lane, of the city and county of Los Angeles, State of California, the party of the second part.

First. The said party of the second part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the first part, his executors, administrators, and assigns, that he, the said party of the second part, his executors, administrators, and assigns, shall and will, for the consideration hereinafter mentioned, on or before forty days, well and truly and substantially erect and finish all the carpenter work, hardware, glass, plumbing, painting, and plastering on the brick building, one story high, to be situated on Upper Main — near the plaza, conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties and hereunto annexed, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of the said R. B. Young, architect, to be testified by a writing
118 or certificate under the hand of the said R. B. Young, architect, and also shall and will find and provide such good, proper, and sufficient materials, of all kinds whatsoever as shall be proper and sufficient for completing and finishing all the carpenter work, hardware, glass, plastering, plumbing, and painting, and other works of said building mentioned in the plans and specifications, for the sum of three thousand one hundred and fifteen dollars; and the said party of the first part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the second part, his executors, and administrators, that he, the said F. C. Howes, Esq., the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well and truly pay or cause to be paid unto the party of the second part, his executors, administrators, or assigns, the said sum of three thousand one hundred and fifteen dollars, lawful money of the United States of America, in the manner following:

First payment, $1,070, when roof is boarded in; second, $1,070, when building is plastered; balance 35 days after completion of work according to contract. All moneys of each and every pay-
119 ment must be applied in payment of material and labor used and employed in the execution of said work or works to the satisfaction of the architect and owner; and it is further agreed that said contractor shall furnish receipts to said architect for partial payments before any subsequent payment becomes due or payable, the last and final payment to be made 55 days after completion of work according to contract:

Provided, That in each of the said cases a certificate be obtained and signed by the said R. B. Young, architect, and in no other way shall any money be paid on said contract.

And it is hereby further agreed by and between the said parties—

First. The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings to the true meaning and intention of the said drawings and specifications.

Second. The contractor, at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding, implements, molds, models, and cartage of every description for the due performance of the several erections.

Third. Should the owner, at any time during the progress
120 of said building, request any alterations, deviations, additions, or omissions from the said contract, specifications, or plans he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.

Fourth. Should the contractor at any time during the progress of said works refuse or neglect to supply a sufficiency of material or workmen the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the expenses shall be deducted from the amount of the said contract price.

Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications the same shall be decided by R. B. Young, architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or works omitted the same shall be valued by two competent persons, one employed by the owner and the other by the contractor; and, in case they cannot agree, these two shall have power to name an umpire, whose decision shall be binding on all parties.

Sixth. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen
121 to the said works or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

Seventh. Said contractor shall be responsible for violation of any city ordinances or damage done to streets and adjoining property, also for any accidents that may occur during the progress of his work, and shall hold the owner free from all loss or damage.

In witness whereof the said parties of these presents have hereunto set their hands and seals the day and year first above written.

F. C. HOWES. [SEAL.]
W. E. LANE. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. E. WELSH.

122 *Articles of Agreement.*

Articles of agreement made this thirty-first day of October, one thousand eight hundred and eighty-seven, between F. C. Howes, of the city and county Los Angeles, State of California, the party of the first part, and W. E. Lane, of the city and county Los Angeles, State of California, the party of the second part.

First. The said party of the second part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the first part, his executors, administrators, and assigns, that he, the said party of the second part, his executors, administrators, and assigns, shall and will, for the consideration hereinafter mentioned, on or before the 25th day of January, 1888, well and truly and substantially do and finish all the carpenter work, &c., on building situated at the junction of New Main and Upper Main street, in the city and county Los Angeles, California, conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties and hereunto annexed, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of the said R. B. Young, architect, to be testified by a writing or
123 certificate under the hand of the said R. B. Young, architect, and also shall and will find and provide such good, proper, and sufficient materials of all kinds whatsoever as shall be proper and sufficient for completing and finishing all the carpenter, mill, and stair work, glazing, furnish all hardware, plumbing, gas-fitting, sewerage, tinning, plastering, painting, galvo-iron cornice, and other works of said building mentioned in the plans and specifications, for the sum of three thousand five hundred ($3,500) dollars; and the said party of the first part doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said party of the second part, his executors and administrators, that he, the said Mr. F. C. Howes, the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well and truly pay or caused to be paid unto the party of the second part, his executors, administrators, or assigns, the said sum of three thousand five hundred dollars, lawful money of the United States of America, in the manner following:

1st payment, $1,000, when second story joist on.

2nd payment, $1,000, when ready for plastering.

124 3d payment, $625, when building completed and accepted by the architect; balance 35 days after completion of building. It is further agreed that said contractor furnish receipts to said architect for payment upon material furnished and labor performed upon said works. It is further agreed that in case said work is not completed at the time herein agreed the said W. E. Lane agrees to pay to the said F. C. Howes fifteen dollars per day as

rental for each and every day the completion of said building is delayed on his part beyond said time agreed.

Provided, That in each of the said cases a certificate be obtained and signed by the said R. B. Young, architect, and in no other way shall any money be paid on said contract.

And it is hereby further agreed by and between the said parties—

First. The specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings to the true meaning and intention of the said drawings and specifications.

Second. The contractor, at his own proper costs and charges, is to provide all manner of materials and labor, scaffolding, implements, molds, models, and cartage of every description for the due performance of the several erections.

125 Third. Should the owner at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, specifications, or plans — shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation.

Fourth. Should the contractor at any time during the progress of said works refuse or neglect to supply a sufficiency of material or workmen the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the expenses shall be deducted from the amount of the said contract price.

Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications the same shall be decided by —— ——, architect, and — decision shall be final and conclusive, but should any dispute arise respecting the true value of the extra work or works omitted the same shall be valued by two competent persons, one employed by the owner and the other by the contractor, and in case they cannot agree these two shall have power to name an umpire, whose decision shall be binding on all parties.

126 Sixth. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works or any part or parts thereof respectively or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted).

Seventh. The said party of the second part further undertakes and agrees that he will pay and hold the party of the first part free and harmless from all loss or damages suffered in any manner by any persons by reason of any accident occurring in connection with the work herein undertaken or occasioned by the carelessness of the party of the second part or any one in his employ.

In witness whereof the said parties *of* these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in the presence of—
F. C. HOWES. [SEAL.]
W. E. LANE. [SEAL.]

127 And thereupon the said defendant offered in evidence the following receipts:

LOS ANGELES, *October* 15*th*, 1887.

Mr. F. C. Howes:

This is to certify that there is due to W. E. Lane, contractor, for your one-story block, junction of New Main and Upper Main streets, the sum of seven hundred and fifty dollars.

$750. R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

LOS ANGELES, *November* 19*th*, 1887.

Mr. F. C. Howes:

This is to certify that there is due to W. E. Lane, contractor, for carpenter work, etc., of your block *on* the junction of Main and Upper Main streets the sum of one thousand dollars.

$1,000. R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

LOS ANGELES, *December* 17*th*, 1887.

Mr. F. C. Howes:

128 This is to certify that there is due to W. E. Lane, contractor, for carpenter work, etc., of your block *on* the junction of Main and Upper Main streets the sum of one thousand dollars.

$1,000.00. R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

LOS ANGELES, *December* 24*th*, 1887.

Mr. F. C. Howes:

This is to certify that there is due to W. E. Lane, contractor, for the carpenter work, etc., of your block at the junction of Main and Upper Main streets the sum of one thousand dollars.

$1,000.00. R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

LOS ANGELES, *February* 25*th*, 1888.

Mr. F. C. Howes:

This is to certify that there is due to W. E. Lane, contractor, for the carpenter work, plumbing, plastering, etc., etc., of your block *on*

the junction of Main and Upper Main streets on the 2d contract the sum of one thousand and fifteen dollars.

$1,015.00 R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

129 LOS ANGELES, *February 25th*, 1888.

Mr. F. C. Howes:

This is to certify that there is due to W. E. Lane, contractor, for the carpenter work, glazing, plastering, plumbing, etc., etc., of your block *on* the junction of Main and Upper Main streets the balance on first contract of nine hundred and seventy-five dollars, and this shall be a receipt in full of first contract on said block.

$975.00. R. B. YOUNG, *Architect.*

Received payment,

W. E. LANE.

To the admission thereof the plaintiffs objected on the ground that the same are incompetent, irrelevant, and immaterial and because the said contracts now in evidence were not filed for record in the county recorder's office before the commencement of work thereunder as required by law or at all or any memorandum of such contract, which said objection was sustained by the court; to which ruling of the court in sustaining the said objection and in refusing to admit the said proof the said defendant, F. C. Howes, by his attorneys aforesaid, then and there excepted.

And thereupon the said F. C. Howes made the following offer:

The defendant Howes now offers to prove that he paid to
130 W. E. Lane, in strict compliance with the terms of the written contract between himself and said Lane, now in evidence and upon certificates of the architect, R. B. Young, that the amounts were due at the time of payment, sums aggregating the sum of $5,745, and for that purpose offers a certificate of said architect that the sum of $750 was due the contractor, Lane, dated Oct. 15, 1887, with the receipt of Lane for that amount, to be followed by like certificates and receipts aggregating the sum of $5,745 (being certificates and receipts above written). This offer is based upon the facts, now appearing in evidence, that the contract between this defendant and W. E. Lane was reduced to writing and subscribed by the parties thereto and in all respects complied with section 1184 of the Code of Civil Procedure, and that the plaintiffs and each of them had notice thereof at the time of their contracts with Lane mentioned in their claim for liens, to which offer the plaintiffs objected on the ground that the same was incompetent, irrelevant, and immaterial and because the said contracts now in evidence or any memorandum thereof were not filed for record in the county recorder's office before the commencement of work thereunder as required by law or at all; which said objection was sustained by the court; to which ruling of the court in sustaining the said objection and in refusing to
131 admit the said proof the said defendant, F. C. Howes, by his attorneys aforesaid, then and there excepted.

The said defendant then offered in evidence as against the plaintiff, The Willamette Steam Mills, Lumbering, and Manufacturing Company, the following documents attached to the contracts between Lane and Howes, already in evidence, for the purpose of proving that said plaintiff had actual notice of the written contracts between the defendant Howes and the contractor Lane.

Bond.

Know all men by these presents that W. E. Lane, as principal, and J. A. Russ, as surety, all of the city and county of Los Angeles, State of California, — held and firmly bound unto F. C. Howes, Esq., of the city and county Los Angeles, State of California, in the sum of twelve hundred dollars, gold coin of the United States of America, to be paid to the said F. C. Howes, Esq., or assigns, for which payment, well and truly — made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifteenth day of September, one thousand eight hundred and eighty-seven.

132 The condition of the above obligation is such that should he, the said W. E. Lane, the above-named principal, duly and properly, well and truly and faithfully comply with and perform all acts, stipulations, and agreements entered into and to be done and performed by the said W. E. Lane as appears in the foregoing contract, and should he not in anywise permit any valid claim, debt, or lien to be placed upon the building in the erection thereof or the incurring of any liability on the part of the said F. C. Howes, Esq., other than the amount to be paid by him to the said W. E. Lane for the said work as in said contract described and specified, then the above obligation to be void; otherwise to remain in full force and virtue.

W. E. LANE. [SEAL.]
J. A. RUSS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. E. WELSH.

Bond.

Know all men by these presents that W. E. Lane, as principal, and —— ——, as surety, all of the city and county Los Angeles, State of California,— held and firmly bound unto Mr. F. C. Howes, of the city and county Los Angeles, State aforesaid, in the sum of one

133 thousand dollars, gold coin of the United States of America, to be paid to the said F. C. Howes, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirty-first day of October, one thousand eight hundred and eighty-seven.

The condition of the above obligation is such that should he, the said W. E. Lane, the above-named principal, duly and properly, well and truly and faithfuly comply with and perform all stipulations, acts, and agreements entered into and to be done and performed by the said W. E. Lane as appears in the foregoing contract, and should he not in anywise permit any valid claim, debt, or lien to be placed upon the building in the erection thereof or the incurring of any liability on the part of said F. C. Howes by reason of the erection other than the amount to be paid by him to the said W. E. Lane for said works as in said contract described and specified, then the above obligation to be void; otherwise to remain in full force and virtue.

W. E. LANE. [SEAL.]
J. A. RUSS. [SEAL.]

Signed, sealed, and delivered in the presence of—

——— ———.

134 The plaintiff, The Willamette Steam Mills, Lumbering, and Manufacturing Company, admitted that J. A. Russ, whose name is subscribed to the said undertakings, is their general agent in this State, and that as such agent he sold the material mentioned in their complaint herein to the defendant, W. E. Lane, but objected to the admission of said documents because the said evidence is incompetent, irrelevant, and immaterial; which said objection was sustained by the court; to which ruling of the court in sustaining said objection and in refusing to admit the said documents in evidence the defendant, F. C. Howes, by his attorneys aforesaid, then and there excepted.

Testimony of David Knox.

DAVID KNOX, being called as a witness on behalf of the plaintiff, Levi M. Kellogg, testified that he was one of the firm of D. Knox & Co., assignors of said Kellogg, and after stating the character of the materials furnished and work done by his firm under their contract with Mr. Lane, being examined and cross-examined, testified as follows:

Examined by Mr. TAYLOR:

Q. What were the terms of the contract?
A. We were to have so much a day for our men and for our stock.
135 Q. Was there any time stated when you were to be paid—when you were to get your pay?
A. No, sir; there was not.

Cross-examined by Mr. MITCHELL:

Q. Didn't you testify when you were on the stand before that these materials were furnished to Mr. Lane and were to be paid for as soon as the labor was performed and materials furnished?

A. I don't think I did.
Q. Well, isn't that the fact?
A. No, sir; I don't think it is.

Mr. TAYLOR: I call for the reading of the testimony.

A. No, sir; I don't think it is.
Q. When was it to be paid for?
A. Well, we never did have any set time.
Q. Then it was not to be paid for cash on delivery?
A. There was no contract about that.
Q. It was not to be paid for, then, on delivery?
A. No, sir.
Q. And there was no set time, you say, when it was to be paid for?
A. No, sir.
Q. Then it was not to be paid for on demand? If there was no set time there was time given, then?
136 A. Well, I suppose so.

And thereupon the said plaintiff, Levi M. Kellogg, elected to stand upon the first claim of lien mentioned in his complaint filed by D. Knox & Co. on March 6, 1888, and prayed judgment in this case upon said lien.

137 *Specification of Particulars in which the Evidence is Insufficient to Sustain the Findings and Decision of the Court.*

The finding that the claims for liens filed by the several plaintiffs "were in due form as required by law" is not sustained by the evidence, in this, that the evidence shows that the claims of lien filed by D. Knox & Co., the assignors of the plaintiff, Levi M. Kellogg, on March 6th, 1888, does not state the time given for payment by the conditions of the contract between said D. Knox & Co. and W. E. Lane, therein recited, and the evidence shows that time was given for such payment.

Errors of law.

1. The court erred in sustaining the plaintiffs' objection to the certificate of the architect, R. B. Young, and receipts of the contractor, W. E. Lane, showing payments by the defendant Howes to the said contractor of the sum of $5,745.

2. The court erred in sustaining the plaintiffs' objection to the defendant Howes' offer to prove that he had paid to W. E. Lane, in strict compliance with the terms of the written contract between himself and said Lane, in evidence, and also the certificates
138 of the architect, R. B. Young, that the amounts were due, sums aggregating $5,745, and in refusing to admit in evidence the certificates and receipts aforesaid when offered for that purpose.

3. The court erred in sustaining the objection of the plaintiffs,

The Willamette Steam Mills, Lumbering & Manufacturing Company, to the admission in evidence of the bonds of W. E. Lane and J. A. Russ attached to the contracts between Howes and Lane, and in refusing to admit said documents in evidence.

4. The court erred in deciding "that each of said plaintiffs is entitled to a lien on the premises described in their said several complaints for the payment to each of the said plaintiffs the said several sums so found due to each of them, with their costs and attorneys' fees in this action as herein allowed, and to a decree for the sale of the said premises or so much thereof as may be necessary to satisfy the said several sums of money and costs," and in ordering judgment for the plaintiffs.

5. The court erred in not ordering judgment for the defendant Howes upon the facts found.

HAYNES & MITCHELL,
Att'ys for Defendant, F. C. Howes.

139 We hereby acknowledge service of the foregoing statement and agree that the same is correct.

DAVIS & TAYLOR,
Att'ys for Levi M. Kellogg.
JOHNSTON & BORDEN,
Att'ys for Willamette S. M., &c., Co.
DAVIS & TAYLOR,
Att'ys for Maitre & Hansen.
BARCLAY, WILSON & CARPENTER
Att'ys for E. L. Tower.
ADAMS & RHODES,
Att'ys for Cal'a Door Co.
SCARBOROUGH & WATERMAN AND
BARCLAY, WILSON & CARPENTER,
Att'ys for A. H. Parsons.
REYMERT, ORFILA & REYMERT,
Att'ys for Pl'ff Breakey.

Los Angeles, April 13, 1889.

The foregoing statement is hereby settled and allowed.

WALTER VAN DYKE,
Judge Superior Court.

April 17, 1889.

(Statement endorsed:) Filed April 17, 1889.

140 In the Superior Court of the County of Los Angeles, State of California.

LEVI M. KELLOGG *vs.* F. C. HOWES.	No. 7840.
WILLAMETTE STEAM MILLS, LUMBERING AND MANUFACTURING CO. *vs.* F. C. HOWES.	No. 7868.
MAITRE & HANSEN *vs.* F. C. HOWES.	No. 7880.
E. L. TOWER *vs.* F. C. HOWES.	No. 7980.
CALIFORNIA DOOR CO. *vs.* F. C. HOWES.	No. 8003.
B. A. BREAKEY *vs.* F. C. HOWES.	No. 8068.
A. H. PARSONS *vs.* F. C. HOWES.	No. 8094.

Minute Entry, April 19, 1889.

This cause, coming on to be heard on the motion of the defendant, F. C. Howes, for a new trial, was this day submitted to the court; and the court being fully advised in the premises, said motion is overruled and denied; to which ruling and decision of the court the said defendant, by his attorneys, Haynes & Mitchell, then and there excepted; and it is ordered by the court that execution herein be stayed for thirty days.

(Minute Book, dep. 4, Van Dyke, No. 1, p. 221.)

141 In the Superior Court of the County of Los Angeles, State of California.

LEVI M. KELLOGG *vs.* F. C. HOWES.	No. 7840.
WILLAMETTE STEAM MILLS, LUMBERING AND MANUFACTURING CO. *vs.* F. C. HOWES.	No. 7868.
MAITRE & HANSEN *vs.* F. C. HOWES.	No. 7880.
E. L. TOWER *vs.* F. C. HOWES.	No. 7980.
CALIFORNIA DOOR CO. *vs.* F. C. HOWES.	No. 8003.
B. A. BREAKEY *vs.* F. C. HOWES.	No. 8068.
A. H. PARSONS *vs.* F. C. HOWES.	No. 8094.

Consolidated.

To the clerk of said court, the plaintiffs above named and their respective attorneys:

You and each of you will please take notice that the defendant, F. C. Howes, hereby appeals to the supreme court of this State from the judgment of the court in these cases, made and entered March 8, 1889, and from the whole thereof; also from the order of the court denying and overruling the said defendant's motion for a new trial herein, made and entered April 19th, 1889, and from the whole thereof.

HAYNES & MITCHELL,
Attorneys for F. C. Howes.

142 Received copy of the foregoing notice of appeal this 8th day of May, 1889.

DAVIS & TAYLOR,
Attorneys for Levi M. Kellogg and Maitre & Hansen.
JOHNSTON & BORDEN,
Att'ys for Willamette Steam Mills, Lumbering & M'f'g Co.
BARCLAY, WILSON & CARPENTER,
Attorneys for E. L. Tower.
ADAMS & RHODES,
Attorneys for California Door Co.
REYMERT, ORFILA & REYMERT,
Attorneys for B. A. Breakey.
SCARBOROUGH & WATERMAN AND
BARCLAY, WILSON & CARPENTER,
Attorneys for A. H. Parsons.

(Endorsed:) Filed May 8th, 1889.

It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to
143 be used on this appeal; that the appeal herein was duly perfected, and the requisite undertaking on appeal was given and filed within the time prescribed by law; that the foregoing is a full, true, and correct transcript, and that the appeal herein may be heard thereon.

HAYNES & MITCHELL,
Attorneys for F. C. Howes.
DAVIS & TAYLOR,
Attorneys for Levi M. Kellogg and Maitre & Hansen.
JOHNSTON & BORDEN,
Att'ys for Willamette Steam Mills, Lumbering & M'f'g Co.
BARCLAY, WILSON & CARPENTER,
Attorneys for E. L. Tower.
ADAMS & RHODES,
JOHNSTON & BORDEN,
Attorneys for California Door Co.
REYMERT, ORFILA & REYMERT,
Attorneys for B. A. Breakey.
SCARBOROUGH & WATERMAN AND
BARCLAY, WILSON & CARPENTER,
Attorneys for A. H. Parsons.

144 *Proceedings in Supreme Court of California.*

LEVI M. KELLOGG *et al.*, Respondents,
vs.
F. C. HOWES, Appellant.
} No. 13324.

1889.
June 26. Filed transcript and stipulation.
Sept. 13. " appellant's points and authorities.
Oct. 2. " respondents' points and authorities.
21. " appellant's reply.

23. Argued and submitted.
Nov. 9. The judgment and order appealed from are affirmed. Works, J.
I concur. Patterson, J.
Concurring opinion. Fox, J.
Nov. 26. Filed petition for rehearing.
Dec. 7. Rehearing denied. The court.
11. Remittitur to county clerk.
18. Filed petition for writ of error to Supreme Court of United States.
Filed certificate of Chief Justice.
1890.
Jan. 4. " writ of error.
Copy of writ of error for defendants in error lodged.
Filed bond.

145 Department one. (Filed November 7, 1889.)

KELLOGG *et al.*, Respondents,
vs.
HOWES *et al.*, Appellants.
} No. 13324.

Held, affirming the judgment and order appealed from—

That under earlier statutes a sub-contractor or materialman could enforce his lien only to the extent of the contract price remaining unpaid.

That under the present statute if the contract is not executed as required by the statute and filed in the recorder's office it shall be void, and no recovery shall be had thereon by either party; that this provision of the statute takes away entirely the basis upon which it was held under earlier statutes that the sub-contractor could not recover, viz., that the owner could not be compelled to pay more than he had contracted to pay, or, in other words, could not be compelled to pay twice for the same thing. The contract cannot be the measure of his liability, because there is no contract. He cannot pay the contractor and thereby relieve himself from liability to the sub-contractor, because, the contract being void as between him and the contractor, he is not liable to the latter and has no right as between him and the sub-contractor to pay such contractor.

That where the contract is not registered and is therefore invalid there is no necessity of a sub-contractor or materialman giving notice of his claim, because there are no payments to be stopped, and the statute itself is notice to the owner that he must not pay to the contractor.

That the contention that the fact of the respondents having actual notice of the existence of the contract was equivalent to the filing of the same in the recorder's office, this would be so if the question were one of notice, but it is not.

That the point made that there can be no recovery by a sub-contractor as against the owner independent of some contract between the owner and original contractor is met by the express language of the statute that for the purposes of his lien he shall be deemed to have contracted directly with the owner and shall have a lien for the value of his material. This brings him in direct contact with the owner as a contractor and removes the distinction made under former statutes between those who contract directly with the owner and sub-contractors. By the terms of the statute they become, for the purpose of their lien, original contractors with the owner, but cannot recover against him personally.

This action was brought by the respondents as materialmen, laborers, and sub-contractors against the appellant to enforce a lien for material furnished and for labor done in the construction of a dwelling-house. The appellant Howes was the owner of the real estate and contracted with his codefendant to construct the building, and the latter contracted with the respondents for the labor and material done and furnished by them. The contract price for constructing the building was more than one thousand dollars, and the contract was not filed for record, as required by section 1183 of the Code of Civil Procedure. The respondents had actual notice that there was a contract between the owner and his contractor, and gave no notice to the owner to withhold payments to such contractor. The owner paid the contractor the greater part of the contract price. The amounts for which the respondents claimed liens exceeded the amount due the contractor and unpaid, assuming the contract to have been valid, but were less than the full contract price. The court below held the contract to be void for the reason that it was not filed for record, and that the respondents were entitled to recover the value of the material furnished and labor done by them without any reference to the amount remaining unpaid to the original contractor by the owner. The only question presented and argued on this appeal is whether or not a materialman or sub-contractor can recover beyond the amount unpaid by the owner to the original contractor on the contract where the same has not been recorded and where no personal notice has been given by such materialman or sub-contractor to the owner to withhold the payments due such contractor, the materialman and sub-contractor having actual notice that there was such a contract.

Counsel for appellants contend, with much earnestness and ingenuity and with marked ability, that the right of the materialman and sub-contractor to enforce his lien is limited, where he has given no personal notice to the owner, to the amount remaining unpaid by the owner to the original contractor. They contend, in substance, that, although the contract is void as between the parties to it, it is not void as to the owner and the materialmen and sub-contractors; that there is a distinction between an original contractor and a materialman or sub-contractor, in that the former has a direct lien upon the real estate of the owner to the full extent of

the amount due him, based upon the personal liability of the owner to him, while the latter have but a lien in the nature of an attachment against the money in the hands of the owners and due the contractor, and that the Legislature had no power to make the owner or his property liable to any greater extent. There is, perhaps, not a single one of these propositions that is not, to some extent, supported by some decision or dictum of this court. The question is, therefore, whether these decisions or dicta are applicable to the present provisions of the mechanics' lien law, and, if so, whether they are such as should control us in the interpretation of such provisions.

The present code, so far as it affects this question, provides:

"In case of a contract for the work between the owner and his contractor the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and shall, before the work is commenced, be filed in the office of the county recorder of the county or city and county where the property is situated, who shall receive one dollar for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." (C. C. P., sec. 1183.)

Again:

"No payment made prior to the time when the same is due under the terms and conditions of the contract shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person except the contractor, but as to such liens such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor to whom it was paid may thereafter abandon his contract or be or become indebted to the owner in any amount for damages or otherwise for non-performance of his contract or otherwise. * * * All such contracts and alterations thereof as do not conform substantially to the provisions of this section shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. Any of the persons mentioned in section 1183 except the contractor may at any time give to the owner a written notice that they have performed labor or furnished materials or both to the contractor or other person acting by authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor or materials and the name of the person to or for whom the same was done or furnished or both, and the amount in value, as near as may be, of that already

done or furnished or both, and of the whole agreed to be done or furnished or both. * * * Upon such notice being given it shall be the duty of the owner to and he shall withhold from his contractor or from any other person acting under such owner and to whom by said notice the said labor or materials or both have been furnished or agreed to be furnished all money due or that may become due to such contractor or other person or sufficient of such money to answer such claim and any lien that may be filed therefor for record under this chapter, including costs and counsel fees provided for in this chapter, until such notice is by writing withdrawn, and all money paid thereafter by the owner to the con-
146 tractor or such other person while such notice is in force shall, for the purposes of all liens of all persons except that of the contractor, be deemed a payment prior to the time the same was due within the meaning of and subject to the provisions of this section." (C. C. P., sec. 1184.)

It has been held in a number of cases under earlier statutes that a sub-contractor or materialman could enforce his lien only to the extent of the contract price remaining unpaid, and that, too, under statutes providing that sub-contractors should have a lien "regardless of the claim of the contractor against the owner," or that the lien should inure "to the extent of the contract price," and "whether done or furnished at the instance of the owner or his agent," and "that the contractor should be deemed such agent, and that the lien should not be affected by the fact that no money was due the contractor."

Counsel for appellant have industriously gathered up and cited these earlier statutes and the cases decided under them. We cite them here more as showing the course of legislation and its judicial construction and interpretation on this subject than because of their bearing on the question now presented. (Stat. 1850, p. 211; Stat. 1855, p. 156; Stat. 1856, p. 203; Stat. 1858, p. 225; Stat. 1862, p. 384; Stat. 1868, p. 589; Code Civil Pro. (1880), sec. 1183; Deering's Code Civil Pro., sec. 1183; Stat. 1887, p. 152; Cahoon *vs.* Levy, 6 Cal., 295; Knowles *vs.* Joost, 13 *id.*, 620; McAlpin *vs.* Duncan, 16 *id.*, 126; Bowen *vs.* Aubrey, 22 *id.*, 566; Dore *vs.* Sellers, 27 *id.*, 588; Benton *vs.* Conley, 49 *id.*, 185; Latson *vs.* Nelson, 11 P. C. L. J., 589; Whittier *vs.* Hollister, 64 Cal., 283; O'Donnell *vs.* Kramer, 65 *id.*, 353; Wilson *vs.* Barnard, 67 *id.*, 422; Wiggins *vs.* Bridge, 70 *id.*, 437.)

It will be observed that all of these cases, so far as they hold that the lien of a sub-contractor shall only extend to the money unpaid on the original contract, are cases in which the contract between the owner and sub-contractor was valid, and each and all of them are based upon the theory, which we fully approve, that where there is a valid contract between the owner and contractor such contract is the measure of the owner's liability, and that in the absence of notice from the sub-contractor of his claim a payment by the owner in conformity to the contract will relieve him to that extent from any claim or lien by the sub-contractor. This is so under the present

statute, and thus far the cases cited are applicable to the present statute and no farther.

Counsel insist that there is but one additional requirement under the present statute, viz., that the contract shall be filed in the recorder's office, and that such a requirement does not affect the principle laid down in the cases decided under former statutes, especially in this case, where it appears that the sub-contractors had actual notice of the existence of the contract, which was in all respects in conformity to the statute. In this contention counsel overlook what we regard as the most material addition to the statute by the last amendment, viz., that if the contract is not executed as required by the statute and filed in the recorder's office it shall be void, and no recovery shall be had thereon by either party. In our judgment this provision of the statute takes away entirely the basis upon which it was held under earlier statutes that the sub-contractor could not recover, viz., that the owner could not be compelled to pay more than he had contracted to pay; or, in other words, could not be compelled to pay twice for the same thing. This cannot be so under the present statute, where his contract is not recorded. The contract cannot be the measure of his liability, because there is no contract. He cannot pay the contractor and thereby relieve himself from liability to the sub-contractor, because, the contract being void as between him and the contractor, he is not liable to the latter and has no right as between him and the sub-contractor to pay such contractor. The statute is too plain on this point to need construction. It not only provides that the contract shall be wholly void and that neither party shall recover thereon, which must have been provided wholly for the protection of sub-contractors, laborers, etc., but in order to make this fact doubly plain it further provides that "the labor done and material furnished by all persons aforesaid except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." In other words, the sub-contractors, laborers, and materialmen shall have their lien precisely as if no contract had never been made between the owner and contractor and the material had been furnished and work done for the owner at his special instance and request.

But counsel say the Legislature had no power to provide for any such liability on the part of the owner, and that this court has so decided. We do not so understand it. It has been held, as we have said, and very properly, that where there is a valid contract the owner cannot be compelled to pay more than he has contracted to pay unless he is notified of the claims of sub-contractors before payment to the contractor. But that is not this case. Here there was no contract. If the Legislature had the power to say to the owner, If you pay the contractor after notice from the sub-contractor of his claim you shall still be liable to the latter, it has the undoubted right to say to him, If you do not execute your contract in a certain form and file it in the recorder's office you shall be liable to materialmen and laborers for the value of their material and labor. There is no hardship or injustice in this provision. The owner is only

compelled to pay once for what he receives and retains the benefit of. He is not bound and has no right, as between him and sub-contractors, to pay the contractor.

If the contract is valid, then under the present statute notice must be given of his claim by a materialman or laborer in order to reach the moneys due the contractor, and if he fails to give such notice the owner is protected by the statute, as held in the cases above cited decided under former statutes. But where there is no valid contract this notice is unnecessary, because there are no payments to be stopped, and the statute itself is notice to the owner that he must not pay to the contractor.

It is urged upon us by counsel for appellant that the contract in this case was void only as between the parties to it, and not as between the owner and materialmen and laborers, and that we have so decided in Giant Powder Co. *vs.* San Diego Flume Co. (20 Pac. Rep., 419). We did not so hold in the case referred to. It was held in that case that the contract between the sub-contractor and contractor for material was valid, notwithstanding the original contract was void as between the parties to it. But the opinion in that case was so worded as to mislead in this respect, and it is broadly stated that the contract, though wholly void, was not void except as to the parties to it. This could not be so. A contract wholly void is void as to everybody whose rights would be affected by it if valid; and here it would be a strange construction of the statute to hold that the failure to file an instrument for record would render it void as to the parties to it, who necessarily gave notice of its contents, and not affect the rights of the only persons sought to be protected by such filing, and who alone could be affected by such failure. The court meant nothing more in that case than to hold that the materialman was entitled to his lien, notwithstanding the contract was not filed in the recorder's office. What was said as to the contract remaining to mark the extent of the recovery of the lienholders, etc., was outside of the real question presented in the case and should be modified. The extent of the materialman's recovery is not measured by the terms of the contract. On the contrary, the statute provides in express terms that where the contract is not recorded the materialman shall have a lien for the value thereof. In case the contract is not recorded the statute and not the contract measures the extent of his recovery; and so it was held in Southern Cal. Lumber Co. *vs.* Schmitt (74 Cal., 625).

The case of Latson *vs.* Nelson (11 P. C. L. J., 589) is greatly relied upon by the appellant. The reasoning of the opinion in that case was not concurred in by a majority of the court, and so far as it may be construed as against the right and power of the Legislature to enact the present statute, as we have construed it in this opinion, it does not meet with our approval. It is extremely difficult to determine what the views of the learned justice who wrote the opinion were as announced in the opinion, but as we construe his language it amounted to nothing more than has been decided in earlier cases that where a valid contract existed between the owner and contractor the former could not be made liable to sub-contractors be-

yond the amount fixed therein, and that section 15 of article XX of the present constitution had not changed that rule. So understood, the opinion is not in conflict with anything we have said in this opinion.

147 As to the contention that the fact that the respondents had actual notice of the existence of a contract was equivalent to the filing of the same in the recorder's office, this would be so if the question were one of notice; but it is not. The express provision of the statute is that if the contract is not filed it shall be void. This being so, there is in fact no contract of which the sub-contractor is bound to take notice, and his knowledge that a contract was attempted to be made, but was not, cannot affect his rights.

The point made that there can be no recovery by a sub-contractor as against the owner, independent of some contract between the owner and original contractor, is met by the express language of the statute that for the purposes of his lien he shall be deemed to have contracted directly with the owner and shall have a lien for the value of his material. This brings him in direct contact with the owner as a contractor and removes the distinction made under former statutes between those who contract directly with the owner and sub-contractors. By the terms of the statute they become, for the purpose of their lien, original contractors with the owner, but cannot recover against him personally. (Southern Cal. Lumber Co. *vs.* Schmitt, *supra.*)

The judgment and order appealed from are affirmed.

WORKS, *J.*

I concur.

PATERSON, *J.*

Concurring Opinion.

I concur in the conclusion reached by Mr. Justice Works in the foregoing opinion and generally in the line of reasoning by which that conclusion is reached. I have no doubt that the Legislature has full power to provide that where, as was done in this case, an owner of real estate, without the intervention of a contract fixing the measure of his liability, proceeds personally or through another acting with his knowledge to make improvements thereon, he shall be liable to mechanics, laborers, and materialmen for the value of their labor and material, and they shall have a lien therefor. In this case there was no contract, for the law itself declares that if not recorded the pretended contract is "wholly void." It is, therefore, as if it had never been made, and fixes no measure of liability for either party or for any purpose. But after negotiating the terms of the contract with Lane, which was never completed and never became a valid contract, Howes permitted him to procure material and erect the building; in other words, permitted Lane to act as his agent in the construction of the building upon which these liens were filed. The statute expressly declares that in such cases the sub-contractor, the laborer, and materialman shall be deemed to have contracted directly with the owner, and shall have a lien for

the value of his material or labor. There is no constitutional objection to such a provision. The obligation most frequently assumed by all men engaged in business and most frequently enforced by the courts is an implied one to do the same thing—to pay the value of labor done or materials furnished at the request of the party receiving the benefit thereof, and it makes no difference whether the request was made by him in person or through one whom he had held out to the world or to the person furnishing the labor or material as his agent in the premises.

But it seems to me that the opinion of Mr. Justice Works is susceptible of a construction which would enable a stranger to go upon the land of an absent or non-resident owner and, through laborers and materialmen, improve him out of his real estate without his knowledge. The Legislature has no power to authorize such a proceeding, and no precedent should be established which would sanction it. No person should be entitled to a lien or personal judgment against an owner in any case unless he contracted the liability in person or it be shown that he had actual notice in some form of the fact that his property was being improved in a manner which might create a liability or lien. A construction of the statute which would give it the effect of creating a lien, where the owner had no knowledge of the improvement, would render it unconstitutional. In this case there is no pretense of want of knowledge, and everything shows that the owner had actual knowledge of the improvement, and the law charges him with knowledge of the fact that there was no contract limiting his liability.

FOX, *J.*

148 *Petition for Writ of Error.*

In the Supreme Court of the State of California.

LEVI M. KELLOGG *et al.*, Plaintiffs and Respondents,
vs.
F. C. HOWES, Defendant and Appellant. } No. 13324.

To the Honorable W. H. Beatty, chief justice of said court:

And now comes F. C. Howes, the appellant in the above-entitled action, by Haynes & Mitchell, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between Levi M. Kellogg, The Willamette Steam Mills, Lumbering & Manufacturing Company, Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre & Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons, plaintiffs and respondents, and F. C. Howes, defendant and appellant, in the supreme court of California, being the highest court of law or equity of the said State in which a decision could be had in said action, and in which a final judgment was rendered against him on the 9th day of November, A. D.
149 1889, in said action, wherein was drawn in question the validity of a statute of said State of California—that is to

say, of section 1183 of the Code of Civil Procedure of said State, as amended by section one of an act approved March 15th, 1887, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, all which appears in the record and proceedings in said action, manifest error hath happened to the great damage of the said F. C. Howes.

Wherefore he prays for the allowance of a writ of error and such process as may cause the same to be corrected by the Supreme Court of the United States.

HAYNES & MITCHELL,
Attorneys for F. C. Howes.

Allowed.
W. H. BEATTY,
Chief Justice Supreme Court of California.

Endorsed: Filed Dec. 18, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

150 *Certificate of Chief Justice.*

In the Supreme Court of the State of California.

LEVI M. KELLOGG *et al.*, Plaintiffs and Respondents,
vs.
F. C. HOWES, Defendant and Appellant. } No. 13324.

I do hereby certify that in the above-entitled case there was drawn in question the validity of section one of the statute of the State of California approved March 15, 1887, entitled "An act to amend sections one thousand one hundred and eighty-three, one thousand one hundred and eighty-four, one thousand one hundred and eighty-seven, one thousand one hundred and ninety-one, and to repeal section one thousand two hundred and three of an act of the Legislature of the State of California, entitled "An act to establish a code of civil procedure," approved March 11, 1872, all relating to liens of mechanics and others, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the court was in favor of the validity of said statute.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

Endorsed: Filed Dec. 18, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

151 *Bond.*

In the Supreme Court of the United States.

F. C. HOWES, Plaintiff in Error,
vs.
LEVI M. KELLOGG *et al.*, Defendants in Error.

Know all men by these presents that we, F. C. Howes, George H.

Bonebrake, and John Bryson, Sr., of the city of Los Angeles, county of Los Angeles, State of California, are held and firmly bound unto Levi M. Kellogg, The Willamette Steam Mills, Lumbering & Manufacturing Company, Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre & Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons in the sum of eight thousand dollars ($8,000.00), to be paid to the said Levi M. Kellogg, The Willamette Steam Mills, Lumbering & Manufacturing Company, Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre & Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons, their executors or administrators; to which payment, well and truly to be made, we bind and oblige ourselves and each of us,
152 jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this twenty-first (21st) day of December, A. D. 1889.

Whereas the above-named F. C. Howes hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the supreme court of California on the 9th day of November, 1889, affirming the judgment rendered by the superior court of the State of California in and for the county of Los Angeles in favor of Levi M. Kellogg, The Willamette Steam Mills, Lumbering & Manufacturing Company, Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre & Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons against the said F. C. Howes:

Now, the condition of this obligation is such that if the above-named F. C. Howes shall prosecute his said writ of error with effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. C. HOWES. [SEAL.]
GEO. H. BONEBRAKE. [SEAL.]
JOHN BRYSON, SR. [SEAL.]

153 UNITED STATES OF AMERICA, }
Southern District of California. }

George H. Bonebrake and John Bryson, Sr., being duly sworn, depose and say and each for himself saith that he is worth the sum of eight thousand dollars over and above all his just debts and liabilities.

GEO. H. BONEBRAKE.
JOHN BRYSON, SR.

Sworn to and subscribed before me this 21st day of December, 1889.
[Seal of the U. S. District *Comp.*, Southern District of California.]

E. H. OWEN,
U. S. Commissioner and Clerk of the U. S. District Court for the Southern District of California.

I approve the above bond and the sufficiency of the sureties thereto.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

Endorsed: Filed Jan'y 4, 1890. J. D. Spencer, clerk, by B. C. Weir, deputy.

154 UNITED STATES OF AMERICA, }
State of California, } *ss:*

I, J. D. Spencer, clerk of the supreme court of California, do hereby certify that the above and foregoing is a true, perfect, and complete transcript and copy of the record and proceedings had in a certain case in said court lately depending, wherein F. C. Howes was appellant and Levi M. Kellogg and others were respondents, and of all papers filed in said case (except the arguments of counsel, the original writ of error, citation, and assignment of errors) as fully as the same remain on file and of record in my said office; and I hereby transmit to the honorable the Supreme Court of the United States, at Washington, D. C., the said transcript, together with the original writ of error, citation, and assignment of errors aforesaid, which are annexed to the said transcript.

Witness my hand and the seal of the said supreme court of California, at the city of Los Angeles, in said State, this 29th day of January, A. D. 1890.

[Seal Supreme Court of California.]

J. D. SPENCER,
Clk Sup. Court,
By B. C. WEIR,
Deputy Clerk.

155 *Assignment of Errors.*

In the Supreme Court of the United States.

F. C. HOWES, Plaintiff in Error, }
vs.
LEVI M. KELLOGG *et al.* }

And now comes the plaintiff in error, by Thomas Mitchell, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I. The supreme court of California erred in holding and deciding that section 1183 of the Code of Civil Procedure of the State of California, as amended in 1887, was constitutional.

II. The supreme court of California erred in affirming the judgment of the superior court of Los Angeles county, because—

1. The said section 1183 of the Code of Civil Procedure of the State of California, as amended in 1887, is unconstitutional and void.

156 2. The said section is in conflict with the 14th amendment to the Constitution of the United States.

3. The said section, as interpreted by the court and as enforced

by the said judgment, deprives the plaintiff in error of his property without due process of law.

4. The said section, as so interpreted and enforced, denies to the plaintiff in error the equal protection of the law.

Wherefore, as well for the foregoing as for other errors apparent on the face of the record, the plaintiff in error prays that the judgment of the supreme court of California aforesaid may be reversed, annulled, and held for naught, and that he may be restored to all things which he has lost by occasion of said judgment, &c.

THOMAS MITCHELL,
Attorney for Plaintiff in Error.

157 UNITED STATES OF AMERICA, *ss:*

To Levi M. Kellogg, The Willamette Steam Mills, Lumbering and Manufacturing Company; Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre & Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of California, wherein F. C. Howes is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of California, this 26th day of December, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

158 [Endorsed:] In the Supreme Court of the United States. F. C. Howes, plaintiff in error, *vs.* Levi M. Kellogg *et al.*, defendants in error. Citation.

LOS ANGELES, CALIFORNIA, *January* 8, 1890.

We hereby accept service of the within citation and acknowledge receipt of a copy thereof.

JOHNSTON & BORDEN,
Attorneys for Willamette Steam M., L. & M. Co.
ADAMS & RHODES &
JOHNSTON & BORDEN,
Att'ys for Cal. Door Co.
BARCLAY, WILSON & CARPENTER,
Attorneys for E. L. Tower and A. H. Parsons.
DAVIS & TAYLOR,
Att'ys for Levi M. Kellogg and Maitre & Hansen.
SCARBOROUGH & WATERMAN,
Att'ys for A. H. Parsons.
REYMERT, ORFLA & REYMERT,
Atty's for B. A. Breakey.

159 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Levi M. Kellogg, The Willamette Steam Mills, Lumbering and Manufacturing Company; Charles J. Maitre and Henry C. Hanson, copartners under the firm name of Maitre & Hanson; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons, plaintiffs and respondents, and F. C. Howes, defendant and appellant, wherein was drawn in question the validity of a statute of said State of California on the ground of its being repugnant to the Constitution and laws of the United States and the decision was in favor of such its validity, a manifest error hath happened, to the great damage of the said F. C. Howes, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. Cal.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice Supreme Court of California.

160 [Endorsed:] United States Supreme Court. F. C. Howes, plaintiff in error, *vs.* Levi M. Kellogg *et al.*, defendants in error. Writ of error. Filed Jan'y 4, 1890. J. D. Spencer, clerk, by B. C. Weir, deputy.

161 In the Supreme Court of the State of California, Department One.

LEVI M. KELLOGG *et al.*, Respondents, } No. 13324. On Appeal from
vs. } the Superior Court in and for
F. C. HOWES *et al.*, Appellants. } the County of Los Angeles.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Works, J.; I concur—Paterson, J.; concurring opinion, Fox, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same are hereby, affirmed.

I, J. D. Spencer, clerk of the supreme court of California, do hereby certify that the foregoing is a true copy of an original judgment made and entered in the above-entitled cause on the 9th day of November, 1889, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this 29th day of January, A. D. 1890.

[Seal Supreme Court of California.]

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX, *Deputy*.

162 [Endorsed:] No. —. In the supreme court, State of California. —— —— *vs.* —— ——. Clerk's costs, $—. Paid by appellant, $—; paid by respondent, $—; total, $—. —— ——, clerk, by —— ——, deputy.

163 In the Supreme Court of the United States.

F. C. HOWES, Plaintiff in Error,
vs.
LEVI M. KELLOGG *et al.*, Defendants in Error.

Whereas it appears that the judgment of the supreme court of the State of California in this case was inadvertently omitted from the transcript of the record herein, it is hereby agreed that the certified copy of said judgment accompanying this stipulation may be filed in this court in order to supply said omission, and that the same may be printed as a part of the transcript herein.

Los Angeles, California, February 1, 1890.

THOMAS MITCHELL,
Att'y for Pl'ff in Error.
H. A. BARCLAY,
Att'y for Defendants in Error.

164 [Endorsed:] Supreme Court of the United States. F. C. Howes *vs.* Levi M. Kellogg *et al.* Stipulation to supply omission in the transcript.

165 [Endorsed:] Supreme Court U. S. 1889, October term. No. 1557. F. C. Howes, pl'ff in error, *vs.* Levi M. Kellogg *et al.* Certified copy of judgment of sup. court of California & stipulation making same part of record.

[Stamped:] Office Supreme Court U. S. Filed Feb. 10, 1890. James H. McKenney, clerk.

Endorsed on cover: California sup. court. No. 1557. F. C. Howes, plaintiff in error, *vs.* Levi M. Kellogg, The Willamette Steam Mills, Lumbering and Manufacturing Company; Charles J. Maitre and Henry C. Hansen, copartners under the firm name of Maitre and Hansen; E. L. Tower, The California Door Company, B. A. Breakey, and A. H. Parsons. Filed February 10th, 1890.

FILED
MAR 13 1890

No. 1557.

Supreme Court

Of the United States.

OCTOBER TERM, 1889.

F. C. HOWES, PLAINTIFF IN ERROR,

vs.

LEVI M. KELLOGG, THE WILLAMETTE STEAM MILLS LUMBERING AND MANUFACTURING COMPANY; CHARLES J. MAITRE AND HENRY C. HANSEN, CO-PARTNERS UNDER THE FIRM NAME OF MAITRE & HANSEN; E. L. TOWER; THE CALIFORNIA DOOR COMPANY; B. A. BREAKEY; AND A. H. PARSONS, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

H. A. BARCLAY,

Attorney for Defendants in Error.

In Error to the Supreme Court of the State of California.

DAILY JOURNAL PRINT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 1557.

F. C. HOWES, PLAINTIFF IN ERROR.

vs.

LEVI M. KELLOGG, CHARLES J. MAITRE AND HENRY C. HANSEN (COPARTNERS AS MAITRE AND HANSEN), WILLAMETTE STEAM MILLS LUMBERING AMD MANUFACTURING COMPANY, A CORPORATION, E. L. TOWER, THE CALIFORNIA DOOR COMPANY, A CORPORATION, B. A. BREAKEY AND A. H. PARSONS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Motion to Dismiss or Affirm.

And now come Levi M. Kellogg, Charles J. Maitre and Henry C. Hansen (co-partners as Maitre & Hansen), Willamette Steam Mills Lumbering and Manufacturing Company, a corporation, E. L. Tower, The California Door Company, a corporation, B. A. Breakey, and A. H. Parsons, defendants in error, and, having procured the record herein, and caused the same to be printed, and presented the same to the court, and having by their attorney, H. A. Barclay, Esq., duly entered an appearance herein, on the 7th day of February, A. D. 1890, for the purpose of this motion, now move the court to dismiss the writ of error herein, on the grounds:

1. That said Supreme Court of the United States has no jurisdiction of this action, or of the parties hereto, or of the subject matter hereof.

2. That none of the matters or things requisite or necessary, under section 709 of the Revised Statutes of the United States, to give the Supreme Court of the United States

jurisdiction of the judgments and decrees of State Courts, appear from the record herein to have been raised, involved, drawn in question or necessarily decided in this action, in the courts of the State of California.

3. That the validity of section one of the statute of the State of California, approved March 15th, 1887, entitled "An act to amend sections 1183, 1184, 1187, 1191, and to repeal section 1203 of the Code of Civil Procedure of the State of California, all relating to liens of mechanics and others," and contained in Chapter II, Part III, Title IV of the Code of Civil Procedure of the State of California, was not drawn in question, in the trial or final decision of this action, by the courts of the State of California, as being repugnant to the constitution, treaties or laws of the United States; nor was any right, title, privilege or immunity under the constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, specially, or at all, set up, or claimed, by the plaintiff in error, or by any party hereto, under such constitution, treaty, statute, commission or authority, in the trial, or final decision of this action by the courts of the State of California.

4. Because it does not appear from the record herein, or from any intendment therefrom, that a federal question was raised or presented to the highest court of the State of California, before the entry of final judgment in this action, or that any such question was actually decided, or that its decision was necessary to the judgment of said State Court.

And, if said motion to dismiss be denied, said defendants in error, move the court to affirm the judgment of the said Supreme Court of the State of California herein, on the ground that it is manifest that the question on which the jurisdiction depends is frivolous, and because it is apparent from the face of the record that there is no error therein.

Brief in Support of the Foregoing Motions.

I.

The record herein was returnable at the October term of this year (1890), but the defendants in error, for the purposes of this motion, have caused the same to be printed, and taken up, before the term to which in regular order it ought to have been returned, relying upon

Ex parte Russell, 13 Wall., 664.

Thomas & Co. *v.* Woolbridge, 23 Wall., 283.

II.

Following is a statement of the case, which is indispensible to the motion to affirm, and will aid us in arguing the jurisdictional question.

The judgment complained of by plaintiff in error was rendered by the Supreme Court of the State of California, under the following statute:

Chapter II, Part III, Title IV, of the Code of Civil Procedure of the State of California, of which we quote the only section necessary for the determination of this case:

"SEC. 1183. Mechanics, material men, contractors, sub-"contractors, artisans, architects, machinists, builders, min-"ers, and all persons and laborers of every class performing "labor upon or furnishing materials to be used in the con-"struction, alteration, addition to or repair, either in "whole or in part, of any building, wharf, bridge, ditch, "flume, acqueduct, tunnel, fence, machinery, railroad, wagon "road, or other structure, shall have a lien upon the prop-"erty, upon which they have bestowed labor, or furnished "materials, for the value of such labor done, or materials "furnished, whether at the instance of the owner, or of any "other person acting by his authority, or under him, as con-"tractor or otherwise." (*Here follows provision for mines, etc.*) * * * * "In case of a contract for the work, "between the reputed owner and his contractor, the lien "shall extend to the entire contract price, and such contract "shall operate as a lien in favor of all persons, except the "contractor, to the extent of the whole contract price, and "after all such liens are satisfied, then as a lien for any bal-"ance of the contract price in favor of the contractor.

"All such contracts shall be in writing when the amount "agreed to be paid thereunder exceeds one thousand dollars, "and shall be subscribed by the parties thereto, and the "said contract, or a memorandum thereof, setting forth the "names of all parties to the contract, a description of the "property to be affected thereby, together with a statement "of the general character of the work to be done, the total "amount to be paid thereunder, and the amounts of all partial "payments, together with the times when such payments shall "be due and payable, shall, before the work is commenced, "be filed in the office of the county recorder of the county, "or city and county, where the property is situated, who

"shall receive one dollar for such filing, otherwise they shall "be wholly void, and no recovery shall be had thereon by "either party thereto, and in such case, the labor done and "materials furnished by all persons aforesaid, except the "contractor, shall be deemed to have been done and furn- "ished at the personal instance of the owner, and they shall "have a lien for the value thereof."

This statute took effect March 15, 1887, and in September, 1887, the plaintiff in error (Howes) began the erection of a building on which these defendants in error bestowed labor and materials, which were furnished by them to one W. E. Lane, a contractor, who it seems had a contract with Howes to put up the building, for $6615 00.

This alleged contract was never filed for record, as directed by the statute. When the building was finished, this action was brought by the defendants in error, to foreclose liens for the value of their labor and materials so furnished, in which action they recovered judgment, and, on appeal, the judgment was affirmed. Thereupon counsel for Howes sued out a writ of error to the United States Supreme Court.

(*The facts will be further discussed and explained in our argument on the motion to affirm, ante.*)

III.

The motion to dismiss is based upon the want of jurisdiction of this court, and the utter absence of any federal question in the record, which, upon examination, will be found to contain:

1. THE PLEADINGS (Tr., fols 3 to 97), wherein the answer of Howes (Tr., fol. 27) contains the usual denials of allegations of *fact*, but no averment of the unconstitutionality of the statute under which the action was brought, nor any defense based upon a constitutional right, privilege or immunity.

2. THE FINDINGS AND JUDGMENT of the trial court (Tr., fol. 98), wherein the statute of the State of California, providing for the liens of mechanics, etc., was upheld, *but not against the objection of the plaintiff in error that it was repugnant to the provisions of the United States constitution*, nor against any protest on his part by which its validity was *drawn in question* as being so repugnant; no such objection or protest was made, nor does the record disclose, even by intendment, that it was.

3. THE STATEMENT on motion for a new trial (Tr., fol. 110), in which the plaintiff in error incorporated such of the evidence as he considered necessary to be used on appeal to the Supreme Court of the state, and from which it does not appear that any evidence was offered and admitted, or refused, against the objection of the plaintiff in error, *that its admission or rejection was in violation of his rights under the United States constitution.*

4. THE SPECIFICATIONS OF ERROR on motion for a new trial (Tr., fol. 137), the order denying a new trial (Tr. fol. 140), and the appeal therefrom, and from the judgment, and here again it will be noticed that in his specifications of error, or bill of exceptions (on appeal to the Supreme Court of the state), the plaintiff in error neither drew in question the validity of the statute under which the judgment was rendered, as being repugnant to the United States constitution, nor set up, nor claimed, that the trial court erred in rendering said judgment because it was in violation of any constitutional right, privilege or immunity to which he was entitled. An averment in a motion for new trial (contained in a record brought up in error from a state court) that a statute of a state upon which the suit was based is "unconstitutional and void," may apply to the constitution of the state, and taken by itself, raised no question for decision below which this court can review in error.

Kansas Endowment Assn. *v.* Kansas, 120 U. S., 103.

The remainder of the record, up to the final judgment of the State Supreme Court (affirming the judgment of the court below), and the denial of a petition for rehearing, is equally barren of anything to show that, at any point during the progress of this case, a federal question was ever raised, or passed upon, or decided.

IV.

Under the rule as laid down in Parmelee *v.* Lawrence (11 Wall., 38 and subsequent cases) the argument of counsel is not sufficient to raise a federal question; therefore, if counsel for plaintiff in error had attempted to raise such a question in his briefs before the state court, no such attempt can be considered here. As a matter of fact, in the briefs filed in the state court by counsel for plaintiff in error, and in his oral argument before that body, not one word appeared from which it could be inferred that he relied

upon any rights under the United States constitution, or in any way endeavored to draw in question the validity of the statute under consideration as being repugnant to the constitution of the United States; it is true that he pronounced the statute, as construed by the trial court, "*unconstitutional and void*," but in the same paragraph, he denied the power of the state legislature to pass such an act, thereby showing that he was challenging the law as being contrary to the provisions of the *state* constitution.

"Where a party objects to a state law as being 'unconstitutional and void' the court properly construes it to mean contrary to the state constitution, and no writ of error will lie from such a decision."

Porter *v.* Foley, 24 How., 415.

Kansas Endowment Assn. *v.* Kansas, 120 U. S. 103.

In this connection we call attention to the opinion of the Supreme Court of the State of California (Tr. page 69), in which the only mention made of the constitutional question is as follows: "But counsel say that the legislature had no power to provide for any such liability, etc."; if a question of such importance as the repugnance of the statute to the United States constitution had been before them, or had been decided by them, is it likely that the opinion would have wholly failed to mention it?

V.

We submit, therefore, that nothing in the record, and nothing *dehors* the record in this case, warranted the Chief Justice of the State of California in allowing the writ of error, or in giving his certificate (Tr., fol. 150), to which certificate and its effect we now come:

"It must affirmatively appear from the record that a federal question was raised and presented to the state court."

Railroad Co. *v.* Rock, 4 Wall., 117.

Wallace *v.* Parker, 6 Pet., 680.

Parmelee *v.* Lawrence, 11 Wall., 36.

Murdock *v.* Memphis, 20 Wall., 636.

Supervisors *v.* Railroad Co., 111 U. S., 361.

Choteau *v.* Gibson, 111 U. S., 200.

Railway Co. *v.* Guthard, 114 U. S., 133.

Brown *v.* Colorado, 106 U. S., 97.

N. O. Water Works *v.* La. Sugar Co., 125 U. S., 29.

Felix *v.* Scharnweber, 125 U. S., 58.

De Saussure *v.* Gaillard, 127 U. S., 233.

Since the amendment of 1867 to the 25th section of the Judiciary Act, omitting that provision by which the court was restricted to the consideration of such errors as appeared "on the face of the record," it is admitted that the rule requiring such errors to appear on the face of the record has been relaxed to a certain extent; but this court has repeatedly said, since the amendment above quoted, that it must appear either on the face of the record, or by a clear and necessary intendment therefrom, that a federal question was raised and presented to the state court.

"The court must be able to see clearly from the whole record that a certain provision of the constitution, or of an act of congress, was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, 143.

"From the beginning, it has been held that to give us jurisdiction in this class of cases, it must appear affirmatively, *on the face of the record*, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

Choteau *v.* Gibson, 111 U. S., 200.

Murdock *v.* Memphis, 20 Wall., 590, 636.

"The reason of this rule is obvious. Our jurisdiction for "the review of a judgment of the highest court of a State "depends on the decision by that court of one or more of the "questions specified in §709 Rev. Stats., and in the way "there mentioned. * * * * It is what was "actually decided that we are to consider, *not what "might have been decided;* and as our jurisdiction "must appear affirmatively, *on the face of the record*, "before we can proceed, the record must show either "in express terms, *or by fair implication*, not only the ques- "tion but its decision. It is not enough to find by search- "ing after judgment, that the requisite question might "have been raised and presented for decision. It must "appear that it was actually raised and actually decided. "It remains only to apply this well established rule," etc.

Detroit Railway Co. *v.* Guthard, 114 U. S., 136.

Brown *v.* Colorado, 106 U. S., 97.

Boom Co. *v.* Boom Co., 110 U. S., 58.

Kansas Endowment Assn. *v.* Kansas, 120 U. S., 103.

The latter case is particularly in point, as illustrating, to

a certain extent, *how* the existence of a federal question ought to appear. The case is exactly parallel to ours, except that on motion for a new trial (before the *nisi prius* court) the plaintiff in error in that case, assigned as one of the reasons why a new trial should be granted, that the statute under consideration was "unconstitutional and void." Yet Mr. Chief Justice Waite, in deciding said case, uses this language: "It is clear that we have no jurisdiction, as "no federal question *appears affirmatively on the face of the "record;* * * * * and it has long been set- "tled that we have no jurisdiction unless it distinctly ap- "pears that a question under the constitution or a law of "the United States not only might have been but actually "was raised and decided. Here there is nothing of the "kind, and, *in the assignment of errors on the petition in error "to the Supreme Court of the state*, no reference was made to "any constitutional question whatever, * * * * "certainly it does not appear unmistakably, on the face of "the record, that the Supreme Court of the state either "knew or ought to have known that the validity of the stat- "ute in question was challenged on account of its repug- "nancy *to the constitution or laws of the* United States."

VI.

It seems, therefore, that it is not enough for the federal question to have been, *as a matter of fact*, raised and decided, but it must in some way appear from the record that such was the fact.

In the present case, however, no attempt was made to raise any such question. The statement on motion for new trial did not allege that the statute was "unconstitutsonal and void"; the assignment of errors on appeal to the State Supreme Court was equally silent on the point (as in the last quoted case), and as the opinion of the court does not show that a federal question was considered or decided, the plaintiff in error is driven to fall back upon the certificate of the chief justice (Trans., fol. 150), to the effect that, in the determination of this action, there was drawn into question the validity of the state statute, on the ground that it was repugnant to the constitution of the United States, and the decision of the court was in favor of its validity, etc. It will be seen from the opinion (Trans., fol. 147), that the chief justice did not participate in the decision of this case; it was argued and submitted in depart-

ment, of which department he was not a member, and it was decided by them; he had, therefore, no better means of deciding whether or not a federal question was raised than this court, to wit: the transcript on appeal (which is included in the record here), until he received the petition for rehearing; in that petition, or in the brief of counsel accompanying it, the assertion was made that the statute in question was "unconstitutional," and this must have been the first intimation received by the chief justice that the plaintiff in error (Howes) attacked the validity of the statute. Even then, no reference was made to the United States constitution, as the brief itself shows:

"A federal question cannot be raised after judgment, on a motion for rehearing."

Boom Co. *v.* Boom Co., 110 U. S. 57.

Counsel for plaintiff in error may contend that this history of the chief justice's connection with the case is outside of the record, and, this being admitted, brings us to the exact position we desire, viz: if *the record* does not show on its face, or by clear and necessary intendment, that a federal question was raised, then the certificate of the chief justice cannot supply the omision; *this court* must be able to determine the question from the record, and without *aliunde* proof as to whether the certificate of the chief justice was properly or improperly given.

"In allowing a writ of error from this court to the high-
"est court of a state, and in issuing a citation, the chief
"justice of that court does but exercise an authority vested
"by congress in him concurrently with each of the justices
"of this court. When counsel applying for the allowance
"of the writ of error insist that a federal question has been
"decided against the plaintiff in error, the chief justice of
"the state court may feel bound to allow the writ, for the
"purpose of submitting to the final determination of this
"court whether such a question was necessarily involved in
"the judgment sought to be reviewed. But his certificate
"that such a question arose and was decided against the
"plaintiff in error cannot supply the want of all evidence
"to that effect in the record. As has been more than once
"observed by this court, 'the office of the certificate, as it
"respects the federal question, is to make more certain and
"specific what is too general and indefinite, but is incom-
"petent to originate the question.' "

Felix *v.* Scharnweber, 125 U. S., 59.

Adams Co. *v.* R. R. Co., 112 U. S., 123.

Brown *v.* Atwell, 92 U. S., 330.
Parmelee *v.* Lawrence, 11 Wall., 36.
Railroad Co. *v.* Rock, 4 Wall., 177.
Lawler *v.* Walker, 14 How., 152.

"Although a certificate of the presiding justice of the "highest court of a state that there was drawn in question "the validity of an act of the state on the ground that it "was repugnant to the constitution of the United States, "and that the decision was in favor of its validity, is enti- "tled to much weight, yet, where evidently the court had "nothing before it but an exception taken and signed in the "subordinate court, which was clearly insufficient to raise such "a question, or to show that it was decided in a way to give "this court jurisdiction, such certificate is not conclusive to "show that a federal question was raised in the case. * "* * * * A federal question cannot be as- "sumed to have been raised and passed on in a state court, "so as to give jurisdiction to this court under the 25th sec- "tion, *when nothing appears in the record* to show on what "grounds the decision of the matter, in which the federal "question is alleged to be involved, was made."

Caperton *v.* Bowyer, 14 Wall., 217, decided in 1871.

Upon examination of the case last cited, it will be seen that in an action for false imprisonment the defendant, Caperton, set up (among other defenses), that the action was barred by the statute of limitations of the State of Virginia, as it existed prior to the 1st of March, 1865 (he having committed the acts complained of in 1862), and asked that the jury be instructed accordingly. But, the legislature of the state having, on March 1st, 1865, passed an act excluding from the period limited by such statutes, the four years during which the state was in rebellion, the trial court refused to give the instruction asked for, and, in lieu thereof, instructed the jury to exclude the said four years from their computation of time; and verdict was thereon rendered for plaintiff, to which the defendant excepted.

Upon appeal, the judgment was affirmed, and the chief justice gave his certificate that "in the aforesaid judgment "there was drawn in question the validity of the statute of "the State of West Virginia, passed March 1st, 1865, en- "titled, 'An act in relation to statutes of limitation,' on "the ground that it was repugnant to the constitution of the "United States; and the decision of this, the highest court "of law and equity in this state, etc., was in favor of the "validity of said statute."

On motion to dismiss for want of jurisdiction, this court say: "Evidently that court had nothing before it but the "exception taken and signed in the subordinate court, which "is clearly insufficient to raise such a question, or to show "that it was decided in such a way as to give this court "jurisdiction in such a case. Undoubtedly such a certifi- "cate is entitled to much weight, as showing that the ques- "tion was decided by the court which gives it, and in the "manner required to give jurisdiction, but it is not conclu- "clusive to show that the question was raised in the case, "as the latter question may depend upon the construction "of the pleadings; or, as in this case, upon the proper con- "struction of the language of the bill of exceptions. * * *

"Writ dismissed for want of jurisdiction."

We submit that in this case no material difference can be shown, and the refusal of the lower court herein to allow the plaintiff in error (Howes) to introduce in evidence his contract, (which was declared void by the state statute) or to show payments made thereunder, was equally insufficient to raise any federal question, as was the refusal of the trial court, in the case last cited, to give the instructions asked by the defendant Caperton, and to give others in accordance with the state statute involved.

The case of Armstrong *v.* Athens Co. (16 Pet., 284), which may be relied upon by plaintiff in error (decided in 1842) goes so far as to say that where the record shows that a federal question *might* have arisen, and the certificate of the chief justice states it *did* arise and was decided, this court takes jurisdiction.

The subsequent decisions of this court, already cited (*supra*) show that no such broad rule has ever been recognized by it.

"It is not enough that the requisite question *might* have been raised and presented for decision."

Railway Co. *v.* Guthard, 114 U. S., 136.
Brown *v.* Colorado, 106 U. S., 95.
Choteau *v.* Gibson, 111 U. S., 200.
Caperton *v.* Bowyer, 14 Wall., 216.
Brown *v.* Atwell, 92 U. S., 330.
Felix *v.* Scharnweber, 125 U. S., 59.
Railroad Co., *v.* Rock, 4 Wall., 177.
Parmelee *v.* Lawrence, 11 Wall., 36.
Lawler *v.* Walker, 14 How., 152.

VII.

Again: "If a record shows on its face that a federal "question was not necessarily involved in the decision of a "case in a state court, and does not show affirmatively that "one was raised, the court will not go out of the record *to* "*the opinion of that court, or elsewhere*, to ascertain whether "one was in fact decided."

Otis *v.* Oregon Steamship Co., 116 U. S., 548.

This last case in a measure indicates where the court will look for the federal question, and failing to find it there will search no further, for Chief Justice Waite says: "Neither "in the pleadings, nor in the evidence, nor in the findings, "nor in the exceptions as shown by the record, was there "any title, right, privilege or immunity specially set up or "claimed under the constitution, or a law or authority of "the United States. * * * * There is not "in the record the least suggestion of a federal question. "We will not look into the opinion therefore, which has "been annexed to the record below in obedience to our rule "8, section 2, to ascertain whether such a question was in "fact decided."

Quoting Moore *v.* Mississippi, 21 Wall, 636.

We submit that in the present case, should the opinion of the court be examined (Trans. fol. 145), no suggestion of a federal question will appear. It does not appear from this record that a federal question *might* have arisen, except in so far as every case which could be tried before any state tribunal presents such a possibility.

VIII.

To illustrate still further how the federal question should appear from the record to give this court jurisdiction, we cite:

Chicago Life Ins. Co. *v.* Needles, 113 U. S., 578.

In that case the defendant (plaintiff in error) at the final hearing of the cause before the trial court moved the court upon written grounds for a final decree in its behalf; one of which was that the statutes of the state under which the proceedings were had were in violation of the constitution of the United States in that they impaired the obligation of contracts, etc.

Held: that the record showed a federal question, although the Supreme Court of the state merely affirmed the judg-

ment on appeal without mentioning the contitutional claim.

In Santa Cruz Co. *v.* R. R. Co., 111 U. S., 361, a case taken up on a writ of error to the Supreme Court of the State of California, the defences interposed by the plaintiff in error were:

1. That the contract sued upon was unilateral.
2. That the board of supervisors exceeded its authority in making it.
3. That a repealing statue had been passed since the contract was made which took away the power of the board to deliver said bonds, etc.

Held: that no objection was made to the validity of the statute under which the board assumed to act, and the plaintiff in error could not raise a federal question by alleging in its brief that "the issuance of the bonds sued for * * * * would deprive the tax-payers of property without due process of law, contrary to the right, privilege or immunity secured by the first section of the fourteenth amendment to the United States constitution."

The answer in this case (Trans. fol. 27) consists merely of denials and allegations of *facts*, and certainly raises no question of the validity of the statute under which the suit was instituted, and no objection was made to the validity of said statute as being repuguant to the fourteenth amendment (or any provision of the constitution of the United States) at any time during the pendency of this action. The case last cited is conclusive that such a question cannot now be raised. Should it be contended that owing to any peculiarities in the system of pleading in use in California, the record could not show that such objection was made, we again call attention to the fact that the case last cited was taken up from this state.

In Chappell *v.* Bradshaw, 128, U. S. 132, on motion to dismiss Mr. Chief Justice Fuller delivering the opinion of the court, says: "To give this court jurisdiction to review "the judgment of a state court under section 709 of the re-"vised statutes, because of the denial by a state court of any "title, right, privilege or immunity claimed under the con-"stitution or any treaty or statute of the United States, it "must appear by the record that such title, right, privilege "or immunity was 'specially set up or claimed' at the "proper time in the proper way. 'To be reviewable here' "says Waite, C. J., in Spies *v.* Illinois, 123 U. S., 181, 'the "decision must be against the right so set up or claimed, and

"the Supreme Court of the State was reviewing the decision "of the trial court it must appear that the claim was made "in that court, because the Supreme Court was only "authorized to review the judgment for errors committed "there, and we could do no more.' Tested by this well "settled rule it is apparent that this writ of error cannot be "maintained, as it is conceded that the plaintiff in error did "not set up a claim in the trial court the limitation, the "benefits of which he now insist should have been accorded "him."

In Baldwin *v.* Kansas, 129 U. S., 52, upon motion to dismiss, where the point relied upon was not raised upon the trial, but was raised for the first time in the Supreme Court of the state. This court held it could not be considered.

Again in Marrow *v.* Brinkley, 129 U. S., 178, Mr. Chief Justice Fuller, delivering the opinion of the court, says: "Unless it appears affirmatively that the *decision of a federal "question was necessary to the determination of the cause, and "that it was actually decided, or the judgment as rendered could "not have been given without deciding it*, this court has no "jurisdiction of a writ of error to a state court." In this case the judgment as rendered involved the decision of no such question, as none such was actually decided.

IX.

Referring to the assignment of errors (Trans., fol. 155), we submit:

1. That the Supreme Court of the State of California did not decide, nor does the record show that they decided, section 1183 of the Code of Civil Procedure, etc., to be *consistent with the constitution of the United States*, because, as the record shows, there was no question of its being repugnant to said constitution before them.

2. The remainder of the assignments of error consist of an attack upon the judgment, because of it alleged violation of the provisions of the fourteenth amendment.

We contend that, inasmuch as the record nowhere discloses that this question was raised, or presented, or decided, it is too late to raise it now. If it were possible for every defeated litigant to take his case to the Supreme Court of the United States on a writ of error by merely *asserting* that the judgment deprived him of his property without due process of law, etc., the result would be that every case decided by the state supreme courts, all over the

union, could be reviewed here, with exception, possibly, of that infinitesimal class of actions the result of which does not involve the taking of property, liberty or life.

As said by Mr. Justice Miller in Murdock *v.* City of Memphis (20 Wall., 629):

"It is to be remembered that there is not even a limita-
"tion as to the value in controversy, in writs to the state
"court, * * * * and it follows that there
"is no conceivable case so insignificant in amount, or unim-
"portant in principle, that a perverse and obstinate man
"may not bring it to this court by the aid of a sagacious
"lawyer raising a federal question *in the record*, a point
"which he may be wholly unable to support by the facts, or
"which he may well know will be decided against him the
"moment it is stated."

If this reasoning is sound when applied to cases where the *psuedo* federal question appears from the record, it applies with greater force to the present case, where the record is silent on that point.

Justice Miller then proceeds to say that this court has been in the habit of receiving the certificate of the state court, signed by its chief justice or presiding officer, as to whether or not a federal question was raised, though *not as conclusive.*

"But," say the court, "after all, the record of the case, its
"pleadings, bills of exception, judgment, evidence, in short,
"*its record*, whether it be a case in law or equity, must be the
"chief foundation of the inquiry."

It could not have been the purpose of the fourteenth amendment to put it in the power of every defeated litigant to constitute this court a court of last resort by merely setting up or claiming (and in the present case *after judgment*) that his property was being taken without due process of law.

As said by Mr. Justice Baldwin of the Supreme Court of this state, in refusing a writ of error in a case where the record showed no federal question:

"If an appeal, with stay of execution be a matter of ab-
"solute right, then every case, civil or criminal, decided by
"the highest court having jurisdiction in the state, could be
"taken up to the federal capital, and all proceedings sus-
"pended until its return. In every criminal case the pretext
"would be that the law was *ex post facto.* * * * *
"and every civil case might be carried thither upon the
"ground of a supposed or asserted repugnance to some pro-

"vision of the federal constitution, or law, or of some "treaty. That damages might be given for frivolous ap- "peals would be no adequate protection against them, and "in criminal cases, no protection at all. The Supreme "Court of the United States holds but one term in each year, "and from the embarrassments and delays attending the "taking of cases from this court to that, the recognition of "this principle would produce the worst possible results."

Ferris *v.* Coover, 11 Cal., 180, an opinion in which Mr. Justice Field, then on the supreme bench of this state, concurred.

If it be contended that this and other opinions of the Supreme Court of the United States, to the same effect (cited *supra*), were prior to the passage of the fourteenth amendment, we call attention to the fact that the fifth amendment contains an exactly similar provision against taking life, liberty or property without due process of law.

But, say counsel for plaintiff in error, the safeguard against indiscriminate appeals would lie in the prerogative of the state chief justice to refuse the writ of error. To this we reply, that if the mere assertion that his property is being taken without due process of law gives him the right to have that question passed upon by the United States Supreme Court, then he is entitled to the writ of error, *as a matter of right*, and the state chief justice cannot refuse it, or, if he does, the writ of error would be granted by one of the associate justices of this court.

X.

Let us take, as an example, a suit upon an ordinary promissory note, wherein the defendant, after denying the execution, etc. (or any other matter of fact), should further set up in his answer (or anywhere else in the record), that the judgment would deprive him of his property without due process of law. Can it be said that he would thereby be entitled to a writ of error to the United States Supreme Court? And yet, to all material purposes, there is no difference between such a case and the one at bar, except that in this case the defendant (Howes) did *not* set up in his answer, nor anywhere else in the record, nor even in his argument before the court, that he claimed any rights under the federal constitution.

XI.

To the allegation that this statute deprives the plaintiff in error of the equal protection of the laws, a reply is well nigh superfluous. The statute is a general law affecting all citizens of the state.

"The clause which forbids a state to deny to any person "the equal protection of the laws was clearly intended to "prevent the hostile discrimination against the negro race."

Slaughter House Cases, 16 Wall., 38.

XII.

On Motion to Affirm.

If however the court should conclude that it has jurisdiction to look into this case by virtue of the mere fact that the plaintiff in error claims immunity under the fourteenth amendment (a view of the case which, as we are persuaded actuated Chief Justice Beatty in granting the writ), we respectfully urge that it is apparent from a casual examination of the transcript, that the jurisdictional question is frivolous, that the statute complained of is not repugnant to the constitution of the United States, and does not deprive the plaintiff in error of his property without due process of law.

XIII.

The term, "due process of law," difficult as it is of exact definition, has never been held by this court to apply in cases of this character. In Davidson *v.* New Orleans, 96 U. S., 103, 104, 105), Justice Miller says:

"It is not a little remarkable that, while this provision "has been in the constitution of the United States, as a "restraint upon the authority of the federal government for "nearly a century, and while, during all that time, the man-"ner in which the powers of that government have been ex-"ercised, has been watched with jealousy, this special limi-"tation upon its powers has been rarely invoked in the judi-"cial forum or in the more enlarged theatre of public dis-"cussion. But while it has been part of the constitution "as a restraint upon the power of the states only a very few "years, the docket of this court is crowded with cases in "which we are asked to hold that state courts and state leg-

"islatures have deprived their own citizens of life, liberty "or property without due process of law. There is here "abundant evidence that there exists some strange miscon- "ception of the scope of this provision as found in the "fourteenth amendment. In fact, it would seem from the "character of many of the cases before us, and the argu- "ments made in them, that the clause under consideration "is looked upon as a means of bringing to the test of the de- "cision of this court the *abstract opinions of every unsuccessful "litigant* in a state court, of the justice of the decision against "him, and of the merits of the legislation on which such a "decision may be founded. If, therefore, it were possible "to define what it is for a state to deprive a person of life, "liberty or property without due process of law, in terms "which would cover every exercise of power thus forbidden "to the state, and exclude those which are not, no more "useful construction could be furnished by this or any other "court to any part of the fundamental law.

"But, apart from the imminent risk of a failure to give "any definition which would be at once perspicuous, com- "prehensive and satisfactory, there is wisdom, we think, in "the ascertaining of the interest and application of such "an important phrase in the federal constitution, by the "gradual process of judicial inclusion and exclusion as the "cases presented for decision shall require. * * * * * * "But under whatever other clause of the federal constitu- "tion we may review the case, it is not possible to hold that "a party has, without due process of law, been deprived of "his property, when, as regards the issues affecting it, he "has, by the laws of the state, a fair trial in a court of "justice, according to the modes of proceeding applicable "to such a case."

Quoting Kennard *v.* Morgan, 92 U. S., 480.
McMillan *v.* Anderson, 95 U. S., 37.

In the concurring opinion of Mr. Justice Bradley to Davidson *v.* New Orleans *(supra)* and in other decisions of this court, leaning to a broader construction of the phrase than that given by Mr. Justice Miller, there is, notwithstanding, a decided unanimity in confining the inquiry of this court as to what constitutes the taking of property without due process of law, to cases where property is in some way taken for *public use.*

"I think therefore," says Mr. Justice Bradley, "we are "entitled, under the fourteenth amendment, not only to see "that there is some process of law, but 'due process of law,'

"provided by the state law when a citizen is deprived of his "property; and that, in judging what is 'due process of law,' "respect must be had to the cause and object of the taking, "whether under the *taxing power*, the *power of eminent do-* "*main* or the *power of assessment for local improvements*, or "none of these. * * * * Such an examin- "ation may be made without interfering with that large "discretion which every legislative power has of making "wide modifications in the forms of procedure in each case, "according to the laws, habits, customs and preferences of "the people of the particular state may require." See also:

Kelley *v.* Pittsburgh, 104 U. S., 78.
Hagar *v.* Reclamation Dist., 111 U. S., 708.
Head *v.* Amoskeag Co., 113 U. S., 26.
Wurts *v.* Hoagland, 114 U. S., 606.
Kentucky R. R. Tax Cases, 115 U. S., 331.
Spencer *v.* Merchant, 125 U. S., 356.
Walston *v.* Nevin, 128 U. S., 578.
Gillette *v.* Denver, 21 Fed. Rep., 824.

XIV.

In the present case the legislature of this state, having the unquestioned right to enact statutes providing for the liens of mechanics and material-men upon the buildings where their labor and material have been bestowed, and being expressly authorized and directed by the state constitution (Art. XX, Sec. 15, Cal. constitution) to pass such laws, had, prior to the inception of this contract, enacted a statute prescribing:

1. That such persons shall have a lien, etc.

2. That in case of a contract between the owner and contractor the lien shall extent to the entire contract price, etc. (Thus giving the owner full protection against being obliged to pay more than he agreed or more perhaps than he is able to pay.)

3. But, prescribing the manner in which he shall make such contract, viz: In writing when the amount exceeds $1000, and that he shall file the same, or a memorandum thereof, in the office of the county recorder, etc., before the work begins, or

4. Failing to do this, such attempted contract shall be wholly void, and in that case the labor done and materials furnished by the persons aforesaid shall be deemed to have been done and furnished at the personal instance of the

owner, and they shall have a lien *upon the building*, for the value thereof.

Subsequent to the enactment of this statute, the plaintiff in error entered into a building contract, which he failed to file for record, and these defendants in error furnished labor and materials which were used in his building; notwithstanding the fact that he was by the law charged with notice that he had no contract, he alleges that he paid out money to the contractor from time to time, and, when this suit was brought to recover the value of the work and materials so furnished, he offered to prove that he had paid out all but a small balance of the contract price, to the contractor under a perfectly void instrument.

This offer was refused. He then attempted to prove that the lien claimants had actual notice of the alleged contract, but the trial court rejected such proof on the ground that they could not have notice of a void instrument, holding further that this was not a question of notice, but of the due execution of the contract, and the legislature had expressly declared the filing in the recorder's office to be a part of the execution. Judgment was ordered for the plaintiffs (these defendants in error) and it was decreed that they should have a lien upon the building for the value of their work and materials, and here it will be remembered that no *personal judgment* or liability was fixed, or attempted to be fixed, upon the plaintiff in error.

From this judgment he appealed, and the Supreme Court of the state affirmed the decision of the court below, holding that the legislature had the power to prescribe the method of making such contracts, and that a failure to comply with such requirements should render them void; thereby deciding that the statute was not in conflict with the state constitution; also, confirming the views of the lower court as to the question of actual notice (Trans., fol. 147.)

XV.

For the purposes of this argument, we consider it hardly necessary to point out at length the sound and salutary reasons which lie back of this rule, and which actuated the legislature in engrafting it upon the mechanics' lien law of this state. To do so would necessitate our reviewing the history of the statute in question, and would be more appropriate to a final argument on the merits of this case than to this

brief upon motion to affirm. Suffice it to say, that prior to the enactment of this statute, the mechanics' lien law in California was practically inoperative, so far as it tended to afford the mechanic and material-man anything like the speedy and efficient remedy which the constitution declared should be his. Foremost among the evils to be remedied, was the fact that dishonest contractors, and unscrupulous owners, were not in any way restricted as to the manner in which they should contract. They could, by the exercise of a very little sharp practice so arrange the contract price, either by making it inadequate to the proper cost of the building, or by so arranging its payments that, when the time came for putting on liens, there was nothing in the hands of the owner to which the lien could attach.

They could enter into a contract inadequate in price.

There was no requirement that payments should be in money only.

They could agree upon any barter, chose in action, or offset as a part or all of the contract price.

The payments could be made in advance, or in such disproportionate installments that no balance could be stopped in the owner's hands without notice given at the close of each day, etc.

It will be remembered that no one had access to these contracts except owner and contractor, and there was absolutely no way in which the mechanic could be secure, except to demand payment in advance, or give notice to the owner at the close of each day that he had performed a day's labor, or furnished a stick of timber, as the case might be, and either of these proceedings would undoubtedly have cost him his employment.

XVI.

The first attempt made by the legislature to remedy these and many other defects, which need not be enumerated, was to pass an act (in 1880), in which they cut the Gordian knot by attempting to overthrow the rule, long settled in this state, that the liens of mechanics, etc., could not exceed the amount due from the owner to the contractor, under the contract, at the time when notice was given him to withhold the same. The amendment of 1880 declared that they should have the liens regardless of whether or not anything was due from the owner to the contractor. In 1883, the Supreme Court of this state declared that amendment

void as repugnant to the provisions of the *state constitution* (Art. I, Sec. 1), declaring that all men have certain inalienable rights, among which are those of acquiring, possessing and protecting property.

It has been the unceasing effort of counsel for Howes, throughout this proceeding, to identify *this case* and *this statute* with the one thus overthrown, which confirms our statement made in the foregoing brief on the jurisdictional question, that all his objections to the validity of the present statute were on the ground of its repugnance to the *state constitution*. These objections, moreover, were made in his argument alone.

XVII.

Following the action of the legislature in connection with this statute, we find that, recognizing the mistake they had made in the amendment of 1880, by utterly disregarded the owner's rights, and burdening him with an unlimited liability, they now set about amending the law in a cautious and conscientious manner, having in view all the previous decisions of the Supreme Court, and particularly the opinion declaring the former amendment unconstitutional, and they produced the amended statutes of 1885 and 1887, the law now complained of by the plaintiff in error.

Warned by the unconstitutionality of the first amendment, and recognizing the fact that a statute must be formed affording equal rights, and equal protection, both to the owner and the material-men, they began by expressly declaring the contract price to be the limit of the recovery, thus affirming and recognizing the rule as contended for by the plaintiff in error, but prescribing a certain way in which such contracts should be made, viz: That they should be in writing and filed for record before the work began, otherwise that they should be void.

In addition to this provision, they incorporated others, in succeeding sections (not in controversy here) prescribing what such contracts should contain as to terms, time of payment, etc., the penalty for neglecting which was to render the contract void, and in all such cases where, through disregard by either party of the requirements of this statute, the contract was rendered void, they further declared that the mechanic and material-man should have a lien upon the building for the value of the labor done and material

furnished, which, for the purposes of such lien, should be deemed to have been done and furnished at the personal instance of the owner.

Why should the contract be recorded? Plainly for the benefit of the material-man and mechanic, that they may have an opportunity to know how much the owner is to pay; when he is to pay it; that none is to be paid in advance; that 25 per cent is to be retained, etc., etc.

And the statue declares that in order to make a legal contract which will protect him, the owner must make it in a certain way—failing to do which he *has* no contract and there *is* no contract price behind which he can take refuge.

It was contended by plaintiff in error that the purpose of the statue was to give the lien claimants notice, the court erred in denying his attempt to show that, in this case, the defendants in error had actual notice of the alleged contract.

To this we reply that the statute makes the contract void as a *penalty* for not filing it, that the purpose of the legislature to make the filing a part of the execution is apparent from the fact that unless so filed for record it is void as between the parties themselves. Were this merely a recording act no such provision would have been inserted, for no recording act known to the law renders an instrument void *as between the parties to it*, because of a failure to record it. In deciding this point the Supreme Court say (Trans. page 70): "It would be a strange construction of the statute to "hold that the failure to file an instrument for record would "render it void, as to the parties to it, who necessarily have "notice of its contents, and not affect the rights of the only "persons sought to be protected by such filing."

In order to better illustrate the position taken by us on this question of actual notice, we insert the following quotation from our brief in the state court on that point:

"We contend that under the statute a material-man may "rely upon the record—he may go to the recorder's office, and "not finding any contract on file, he may then furnish his ma- "terial, secure in the knowledge that the building is liable.

"Not finding any contract on file he may feel relieved of "the necessity to inquire into the contract price, or to give "notice to the owner to withhold payments, or, in short, to "do anything more than he would do if the owner ordered "the material in person.

"It is the owner's right to put this contract on file in or- "der to protect himself—in short to *make it a contract*—and,

"if he fail to do so, the material-men are justified in assum-
"ing that he has waived it, and that he *expects* to pay them
"for their material.

"The failure to file for record is, in effect, notice to all
"mechanics and sub-contractors that the owner will see to it
"that they are paid before he settles with the original con-
"tractor.

"How then can he be permitted to come in afterwards
"and say to them: 'I have paid the contractor for your la-
"bor and material. You must look to him.'

"If they had furnished the goods to the contractor upon
"the guarantee of the owner that he would pay the bills, he
"could with equal justice set up the same defense.

"Supposing for the sake of argument that these material-
"men had, at some time during, or before, the commence-
"ment of this work, overheard a conversation between Mr.
"Howes and his contractor, wherein the contractor had said
"that he could or would do the work for $6,615.00.

"Could it be said that they were charged with notice of
"the contract price?

"Howes and his contractor might have made some change
"either in the work to be done, or the price to be paid, be-
"fore they reduced this verbal agreement to writing, and the
"material-men, who had governed themselves by the con-
"tract price thus overheard, would, when they came to sue
"on their liens, find a different contract.

"Again, suppose for the sake of argument, that these
"lien claimants had all *seen and inspected* this contract after
"it had been reduced to writing, and the contract price was
"still $6,615.00.

"Howes and his contractor might, before recording, re-
"write it entirely, and change every provision, without any
"hesitation, for until it is recorded *it is no contract*, and
"neither could sue the other on it."

To quote the opinion of the state Supreme Court (Trans. page 69): "It has been held, and very properly, that where "there is a valid contract, the owner cannot be compelled to "pay more than he has contracted to pay unless he is noti-"fied of the claims of sub-contractors before payment to the "contractor. But that is not this case. Here there was no "contract. If the legislature had the power to say to the "owner 'If you pay the contractor after notice from the sub-"contractor of his claim you shall still be liable to the lat-"ter,' it has the undoubted right to say to him, 'If you do "not execute your contract in a certain form and file it in

"the recorder's office you shall be liable to material-men "and laborers for the value of the material and labor.' "There is no hardship or injustice in this provision. The "owner is only compelled to pay once for what he receives "and retains the benefit of. He is not bound and has no "right, as between him and sub-contractors, to pay the con-"tractor.'"

XIX.

It was urged by counsel for Howes that when the legislature (after declaring the contract void if not filed, etc.) went on to give a lien to the mechanics and material-men for the value of their work and materials, as if the same had been furnished at the owner's personal instance, they in effect made a contract between two individuals, and forced upon the owner a liability he never contemplated.

This applies with equal force to all mechanics' lien laws. Whether there is a valid contract between the owner and contractor or not, there is really no privity of contract as between the owner and subcontractor, or material-man, who has dealt exclusively with the contractor.

The law, in giving the material-man any rights whatever superior to those of ordinary vendor of goods (who must look to his vendee for payment, and to him alone), does just what counsel for plaintiff in error protest against most earnestly.

We submit that, in this respect, the law under discussion is no more an infringement of the rights guaranteed the owner by the constitution than is any other such statute. The charge that it is unjust and inequitable, and forces a contract upon the owner, may be met in two distinct ways:

1. On the hypothesis that the law giving relief to the sub-contractor and material-man is based upon the equitable principle, that he who derives the benefit of another's labor, and whose property is permanently bettered by improvements placed thereon in good faith by a third person, should be held to have intended to pay therefor, *unless* by filing his written contract, he gives notice as to *how much he does intend to pay.*

2. On the theory that the mechanics' lien law is not founded upon contract or dependent upon any contractual relation, express or implied, between the owner and material-man; that the latter is given the right merely to follow his goods after they are blended in the structure, and to

hold his lien on them until he is paid.

And it will be remembered that no *personal* liability is attempted to be fastened upon the owner; the *property* alone is liable, and for no more than the *value* of the materials, etc.

XX.

Having thus explained, as briefly as possible, the effect given to the statute in question by the state court, and the points in controversy, we again respectfully urge that the fourteenth amendment cannot, by any possibility, have been intended to interfere with cases of this character.

Here, a state legislature, whose constitutional right to legislate upon this subject is undisputed, passes a law declaring what shall be the remedy afforded by the law to laborers, artisans and material-men in dealing with other citizens of the state, and giving them a lien, not dependent upon possession, for the value of their labor and materials after the same have been incorporated into buildings, under certain conditions. It does not deny to the plaintiff in error any rights or privileges, or process of law, which any other citizen of the state may enjoy.

The plaintiff in error declares that the conditions under which this lien is given are unjust. We think otherwise, but, as said by Mr. Justice Iredell, in Calder *v.* Bull (3 Dall., 398):

"If the legislature of the union, or of any member (state) "of the union, shall pass a law within the general scope of "their constitutional power, the court cannot pronounce it "void merely because it is, in their judgment contrary to "the principles of natural justice. The ideas of natural "justice are regulated by no fixed standard, the ablest and "purest men have differed upon the subject, and all that "the court could properly say in such an event would be, "that the legislature (possessed of an equal right of opin-"ion) had passed an act which, in the opinion of the judges, "was inconsistent with the abstract principles of natural "justice."

Therefore, without admitting that this case in any way conflicts with a natural and just determination of the rights of the parties, we contend, that grant the power of the legislature to enact these laws, and a difference of opinion between this court and the legislature as to whether or not the

plaintiff in error has been subjected to a hardship, does not authorize this court to reverse this decision, provided that the usual and regular process of the courts was allowed the plaintiff in error, about which there is no dispute.

Plaintiff in error says he has been made to pay twice for his building; if the payment made by him to his contractor, under the void contract, was *erroneously* made, (and the state court has decided that it was) then how can his having paid it affect *our rights?* (Trans., page 70.)

XXI.

That a state court holds a contract void which the Supreme Court may consider valid, gives the Supreme Court no jurisdiction.

Railroad Co. *v.* Rock, 4 Wall, 177.

Lehigh Water Co. *v.* Easton, 121 U. S., 392.

Here we call attention to the fact that the plaintiff in error has not attacked this law on the ground that it impairs the obligation of a contract for the obvious reason that his contract was made subsequent to the enactment of the statute.

"The rights of parties under mechanics' lien laws are to "be ascertained and fixed by the law in force when the con-"tract was made."

Phillips on Mech. Liens, Sec. 24.

"As to future contracts, there is no doubt the legislature "may make such regulations affecting the right of lien be-"tween the parties, and priorities of third persons, that "shall be deemed advisable.

"Indeed there is no provision of the constitution which "precludes the legislature from declaring a statutory "lien, in respect to future contracts, in favor either of the "contractor or laborer, upon the land of the owner at whose "instance and for whose benefit the services are performed. "Every contract is presumed to be executed with reference "to existing laws."

Phillips on Mech. Liens, Sec. 30.

Jackson Assn. *v.* McGruder, 43 Ga., 9.

Blauvelt *v.* Woodworth, 31 N. Y., 285.

Edwards *v.* Elliott, 21 Wall, 532.

In view of the absence of any meritorious ground for prosecuting this writ of error, and it being manifest that the proceedings on the judgment in the lower court have been delayed thereby, we respectfully urge that the provi-

sions of section 2, rule 23, of this court relative to awarding damages for such delays, ought to apply here, and in the event of a dismissal or affirmance the defendants in error should be entitled to such damages, as well as to interest and costs.

Respectfully submitted,

H. A. BARCLAY,

Attorney for Defendants in Error.

No. 1557.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

F. C. HOWES, PLAINTIFF IN ERROR,

vs.

LEVI McKELLOGG, ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR, IN MOTION TO DISMISS OR AFFIRM.

THOMAS MITCHELL,
Attorney for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1557.

OCTOBER TERM, 1889.

F. C. HOWES,
Plaintiff in Error.

vs.

LEVI M. KELLOGG, *et al.*
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

I.

The general propositions contended for so earnestly by the other side, and supported by such a wealth of citations, are not disputed. That it must appear, in some way in the record, by express averment or by necessary intendment, that a federal question was necessarily involved in the State Court; that is, that such a question was raised and decided, and that its decision was necessary to the judgment pronounced, are propositions so well settled, that they hardly called for any vouching of the authorities.

But counsel on the other side, in his haste to get out of this Court, has overlooked the point, that, after all, it is *the fact* that a federal question was involved, and not the *evidence of the fact*, upon which the jurisdiction of this Court depends. And this motion proceeds upon the theory that the certificate of Chief Justice Beatty must be corroborated by something in the record; and, that this Court will permit it to be impeached by the statements of counsel. But as we understand the practice of the Court, a case is not dismissed because the evidence of the jurisdictional fact is not the very best that might have been produced, nor because the federal question was not raised in every possible way, or even in the neatest and most apt way that it might have been raised, provided the evidence which is produced is sufficient to satisfy the Court of the jurisdictional fact. That is the substance; all the rest is matter of detail within the control of the Court. And the Court has

wisely declined to fix arbitrary rules in these mere matters of detail ; as, for example, when considering the circumstances under which the opinions of the State Court may be examined. And in many, if not in most, of the cases in which a motion to dismiss has prevailed, while these matters of detail have been discussed, the judgment has been placed upon the ground that it was perfectly clear, from the record itself, that no federal question was involved ; while in at least one case (116 U. S. 414), although the opinion states that the federal question did not appear affirmatively on the face of the record, a motion to dismiss was denied, because "the point is made here, and it is possible its decision was necessarily involved in the final order that was made."

Now the certificate of Chief Justice Beatty, in this record, is certainly some evidence that a federal question was raised in this case and that it was decided in the way necessary to give this Court jurisdiction ; and, under the decisions cited by the other side, it is sufficient evidence unless it appears affirmatively in the record that no such question could have arisen, or, that, if raised, its decision was not necessary to the judgment pronounced.

The certificate is in the exact language of the one in Armstrong v. Athens, 16 Peters 284. In that case the Court took occasion to state at length "the principles upon which the Court has constantly acted and which may now be regarded as the law of the Court" in cases in error from the State Courts ; and, after stating the different ways in which the jurisdictional fact might appear, it was said, in passing upon the record then before them :

> "We presume that the certificate of the presiding judge was made by the authority of the Court ; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise, and was decided, the case comes within the fourth clause above mentioned, and this Court must take jurisdiction, and examine whether the point so certified was rightfully decided."

The subsequent cases which are cited on the other side merely hold that the certificate will be of no avail where it fails to show clearly what statute was called in question, or when it appears from the record, that a federal question was

not involved, as, for example, where it thus appears, that the Chief Justice erred in calling the point raised a federal question, or, that the decision of the point raised was not necessary to the judgment pronounced. The cases, therefore, do not qualify or limit the rule above laid down, nor do they even illustrate exceptions to it. They illustrate distinct rules perfectly consistent with the "broad rule," and which are logically suggested by its terms.

The distinction between this case and Caperton vs. Bowyer, 14 Wall, 217, which counsel specially relies on, is broad and palpable. In the opinion of the Court in that case it is clearly demonstrated that, admitting that the federal question was raised, its decision was not necessary to the judgment pronounced in the lower court. And what may have had weight with the Court, although not mentioned in the opinion, is the further fact, that the statute mentioned in the certificate, and the whole proceeding in the State Court, long antedated the 14th Amendment, and that the claim that the plaintiff in error had been deprived of a constitutional right was based by his counsel on the 5th Amendment. But the first ten amendments have always been held to be limitations on the federal, and not on the state, goverment, a fact which our learned friend has overlooked in one part of his argument in this case. (p. 16)

"The office of the certificate, as respects the federal question, is to make more certain and specific what is too general and indefinite", quotes our learned friend (p. 9), but he insists that this certificate is insufficient because the federal question does not appear elsewhere in this record, an argument which would exclude the certificate in all cases except when it was unnecessary. "It is incompetent to originate the question," he says, quoting the same authorities. Of course it is, and for the manifest reason that it is only evidence of a fact, and it is the fact itself, and not the evidence which is offered to prove it, which originates the jurisdiction. That "the certificate is not conclusive" is perfectly clear, but it is very persuasive evidence, and, as this Court has said "entitled to great weight." The question is not whether is is true in fact but whether it is true in law. In other words, the question is whether the Chief Justice erred in giving it. It is certainly conclusive, unless plainly contradicted by the record, as to the fact that the point certified was raised and decided, and the only question open to

discussion, it is conceived, upon such a certificate as the present one at least, is whether the point was involved, that is, whether its decision was necessary to the judgment pronounced. The motion proceeds upon the theory that counsel can raise an issue of fact by contradicting the certificate in their brief. But the real point at issue is one of law and it must be tried, too, by the record. It calls for very brief discussion.

This was a proceeding to foreclose Mechanic's Liens, that is, to enforce a pure statutory right. Admitting all the facts alleged in the Complaints and found by the Court, they do not constitute the shadow of a cause of action against Howes, unless they are taken in connection with this statute. And while judgment might have gone for him, on the trial, upon several distinct grounds, a judgment against him necessarily affirmed, tacitly, if not expressly, the validity of the statute. Manifestly, therefore, the question of the validity of the statute—its constitutionality—might have been raised by Howes, and, if raised, a decision of the point was necessary to the judgment pronounced. The record on appeal shows, that, except as to one of the plaintiffs, and as to one point, no attack was made upon the findings of fact. The appeal from the order overruling our motion for a new trial cuts no figure, of course, in this Court. But the Code of Civil Procedure provides that the "statement" prepared on that motion may be used as the statement on appeal from the judgment. It performed in this case the functions of a Bill of Exceptions, and brought up for review the rulings of the trial court excluding our offers of evidence during the trial. The only question open to discussion, therefore, was the meaning and legal effect of the statute, upon which the plaintiffs' right exclusively depended. And while the judgment appealed from might have been reversed on several grounds, in order to affirm it, it was necessary for the Court to decide that the statute, properly interpreted, did confer the statutory rights which the plaintiffs claimed, and that the statute, so interpreted, was valid.

The validity of the statute, therefore—that is, the power of the legislature to enact such a statute—was a point necessarily involved throughout these proceedings, and it is clear, that the point might have been raised, that it was invalid as repugnant to the Constitution of the United States.

The question upon this motion, is not whether such a point might have been well taken, but whether the point

might have been raised, etc. This Court decided in Armstrong vs. Athens that the point was not well taken, and the same conclusion has been reached upon final hearing, or upon motion to affirm, in many of the cases in which their jurisdiction was sustained. But it does not appear with any greater certainty in the case last mentioned that the federal question which was certified, might have arisen, than the same fact appears in this record. In both alike, the rights of the parties depended exclusively upon a statute. In the one case it was a special statute and was pleaded ; in the other it was a general statute and could not have been well pleaded. In both the question of the validity of the statute, which was a pure question of law, was raised in argument. And our learned friend is manifestly in error, when he deduces from the cases the conclusion, that the federal question cannot be raised in that way. All that they hold is, that it cannot be interjected into a case, in which it is not involved, by the arguments of counsel, by the opinion of the Court, by the certificate of the Chief Justice, or in any other way.

Assuming, therefore, that the whole question in the lower Court, in this case, might have been the interpretation of the statute, or some other question of purely State jurisdiction, the point might have been involved that the statute was repugnant to the federal constitution. And it is the office of the certificate to remove just such uncertainty in just such cases, and to inform this Court whether or not the federal question, which might have arisen, was raised. And "as this certificate on the record states that it did arise and was decided," and as it is apparent from the record, that, if raised, its decision was necessary to the judgment pronounced, we submit, that "this Court must take jurisdiction and examine whether the point so decided was rightfully decided," even if the "most casual examination" will satisfy them, as our learned friend insists, that the point is so frivolous as to call for a summary affirmance of the judgment.

The certificate of the Chief Justice does not need to be corroborated in any way. Although not conclusive, it is conclusive unless contradicted by the record. But we may briefly suggest, that if it were out of this record, the fact that a federal question was involved in this case would sufficiently appear by necessary intendment. It is certainly unnecessary to combat the extreme views of counsel on the

other side, as to the office of the opinions of the lower Court in determining this question. And if, as Mr. Justice Works says, we "denied the power of the legislature to impose this liability on a owner," and "greatly relied" upon Latson v. Nelson, which he overruled, then by looking at that case (and counsel on the other side have furnished a sufficient abstract of it in his brief p. 21–22), it is clear that the point actually raised must have been that the statute deprived Mr. Howes of some inalienable right; in other words, that it deprived him of his property without due process of law. And counsel practically admits that this is exactly the point that was raised and insisted upon "throughout these proceedings," but he says that our objections to the statute were on the ground of its repugnance to the state constitution. The "certificate on the record" is a sufficient answer to this proposition. But we cannot resist venturing a few words of explanation. What he probably means in thus contradicting the certificate, is that we did not *cite* the federal constitution. Now even this (through inadvertance we feel sure) is not strictly accurate. But suppose it were. Is the *citation* of the federal constitution essential in order to raise a federal question? Surely it is "a vain and preposterous thing to prove rules and maxims." And when the point is raised in a state Court, that a given statute is *ex post facto*, impairs the obligation of a contract, or (since the 14th Amendment) that it deprives a person of his property without due process of law, etc., the Court and counsel may certainly be presumed to know, without being referred to the book and page, that the validity of the statute is being called in question as repugnant to the Constitution of the United States.

We do not feel called upon to notice the many statements outside of the record with which the brief in support of this motion abounds. Counsel has very clearly demonstrated that this question must be tried *by the record;* without any discourtesy, therefore, we may appeal from the statements in his brief, to the record. But we may be permitted a single digression, in reply to the suggestion "that the Chief Justice did not participate in the decision of this case." By an express provision both of the Constitution and of the Code of Procedure of California, the judgment of a department of the Supreme Court does not become final until the expiration of thirty days after it is rendered, unless approved by the Chief Jus-

tice in writing with the concurrence of two Associate Justices; and notwithstanding such judgment, the Chief Justice, during these thirty days, may in his discretion, with the concurrence of two Associate Justices, order the case to be heard in bank. The rules of the Supreme Court provide for application to hear causes in bank, both before and after hearing in Department, by printed petition, addressed to the Chief Justice or the Court, setting forth the question involved and the reasons why it should be heard in bank. This petition, if made after judgment in Department, is very generally styled a Petition for Rehearing, but it is manifestly a very different thing from the petition referred to in such cases as Boom Co. vs. Boom Co., 110 U. S. 57. It does not ask a rehearing by the Court which has already heard the cause, but a hearing by a Court which has not yet heard it, and it is a proceeding in the cause before final judgment. Our application in this case for a hearing in bank, styled in the record a Petition for Rehearing, was filed within the time mentioned in the statute and the rule of Court, and was denied; and, as it manifestly was the duty of the Chief Justice to consider it, the presumption that he did so, and that he was "fully advised in the premises," when he allowed this writ of error and signed this certificate, is one of so high and conclusive a nature, that it would be as idle, as it would be improper, for us to attempt to fortify it in any way.

II.

The motion to affirm certainly calls for no argument. There is absolutely nothing in this record to "make it manifest that the writ was taken for delay only," and that specific ground is not assigned in the motion. And surely it must need but a brief statement of any case to enable this Court to determine at a glance, whether it comes within the remainder of their rule. A frivolous point, like a rule or maxim, does not call for proof. But our learned friend has required twelve pages of argument and some score of "authorities" to prove that the question in the case is "so frivolous as not to need further argument" and, he says he has been "as brief as possible." We feel great confidence that, as soon as counsel can be heard, the Court will hear from the other side.

The concluding paragraph of the motion "that it is apparent from the face of this record that there is no error therein," raises the question to be discussed upon final hearing. That is not a ground of affirmance within the rule, and even if upon an ex parte argument the court should be inclined to the opinion that there is no merit in the case, to quote the language of the late Chief Justice in one of the cases, "further argument may show the contrary."

But we do not wish to be understood as admitting for a moment, that the other side has correctly stated the question which this record presents for argument. As we understand the rule, as illustrated by the cases in which it has been enforced, a judgment is affirmed on motion, only, when the question is frivolous in the strict sense of that word, so that it is manifest that the case has been brought here only for delay; or, the record for want of a bill of exception, assignment of errors, etc. presents no question for argument; or, the question presented has been frequently argued and is settled by the decisions of this Court. In other words, to bring a case within the rule it must appear that the question presented is one which would justify any court in declining to hear argument. But it certainly cannot be made to appear that a case is of this character by the mere statement of opposing counsel. This question, too, must be tried by the record, and we appeal from our learned friend's statement of the questions to be argued, to the face of the record, the certificate of the Chief Justice, the opinions of the Court, our assignments of error in this Court, and the fair presumption that we know that this writ of error does not bring up *the case* for consideration but the federal question only.

Now that the Supreme Court of California permitted an argument as to the power of the legislature to enact this statute, and that they took some pains to answer it, is apparent in this record. We are charged, in the opinion of Mr. Justice Works, with industry and earnestness and ingenuity and some other nice things, but nowhere with frivolity. And it is said further that "there is, perhaps, not a single one of these propositions"—that is, the propositions which we advanced—"that is not, to some extent, supported by some decision or dictum of this Court." And these former decisions are expressly approved, but they are "distinguished" from this case, with the exception of Lat-

son v. Nelson, upon which, it is said we "greatly relied;" and, as that case could not be satisfactorily "distinguished," it is "disapproved," "so far as it may be construed against the right and power of the legislature to enact the present statute." It appears, therefore, that there is some conflict or apparent conflict in the decisions in California bearing on this question, and Mr. Justice Fox is even afraid that the opinion of Mr. Justice Works goes too far, and is susceptible of a dangerous construction on constitutional grounds. Now the very nature of the question involved deprives the latest opinion of the Supreme Court of the State of any greater intrinsic weight in this Court than the earlier ones possess. The question is, which is right? No state legislature has ever, in the history of the country, possessed the power to deprive a person of his property without due process of law, although until recently this Court has had no jurisdiction to inquire into the matter. And "due process of law" means the same thing in every state as it means in California, and it had the same meaning when the former cases were decided there as it has now. Whether or not there is any valid distinction between this case and the long line of consistent cases in the Supreme Court of California, unbroken by a dissenting opinion or a single dictum, which hold that the legislature "certainly has not the power" to impose the obligation which this statute imposes; whether or not the reasoning in these earlier cases is sound; whether or not a trial is according to due process of law, when the essential fact upon which the defendant's liability depends, is determined against him in advance, by a conclusive presumption created by an act of the legislature, contrary to the truth of the matter as known to and acted upon by all the parties to the transaction; whether or not (admitting the power of the legislature to require a contract of this character to be in writing and recorded, and to declare that otherwise "no recovery shall be had thereon by either party thereto," and even, for argument's sake only, its power to declare that if the contract is not recorded it shall be treated as "no contract" for all intents and purposes after it has been fully performed, not only when the circumstances make the principles of equitable estoppel applicable, but arbitrarily and under all circumstances) the legislature has the power to declare, that, because a contract in writing between A and B, to do a perfectly lawful act was not filed

for record, therefore, A shall be liable to C for labor performed by him for B under the unrecorded contract ; these are some of the questions which the opinions in the lower Court disclose as the questions presented by the record. And it is certainly idle to suggest even that a case which presents such questions, which received the consideration which this one did, and which is discussed as this one is in the opinions in the State Court can become frivolous when removed here for the express and only purpose of determining whether it was "rightfully" decided in the lower Court.

Respectfully submitted,

THOMAS MITCHELL,

Att'y for Plaintiff in Error.